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In the Supreme Court of the United States

OCTOBER TERM, 2005

ILLINOIS TOOL WORKS INC. AND TRIDENT, INC.,

Petitioners,

v.

INDEPENDENT INK, INC.,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

JOINT APPENDIX

VOLUME 2 OF 3

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

INDEPENDENT INK, INC., a California corporation Plaintiff vs. TRIDENT, INC., believed to be a Connecticut corporation,and DOES 1 through 50, Defendants.	) CASE NO. CV98—6686 NM (CWx)))) **INDEPENDENT, INK'S**) **MEMORANDUM OF**) **POINTS AND AUTHORITIES**) **IN SUPPORT OF ITS MOTION**) **FOR SUMMARY JUDGMENT**) **OF (1) PER SE VIOLATION OF**) **THE ANTITRUST LAWS BY**) **PATENT TYING WITH THE**) **SINGLE USE LICENSE ON**) **THE PATENT WHICH**) **TRIDENT/ITW ARE**) **ASSERTING AGAINST**
TRIDENT, INC., a Connecticut corporation Counterclaimant, vs.	) **INDEPENDENT INK; (2) PER**) **SE VIOLATION OF THE**) **ANTITRUST LAWS BY**) **PATENT TYING WITH THE**) **CONTRACTS BETWEEN**) **TRIDENT/ITW AND THEIR**) **OEM CUSTOMERS; (3) PER**) **SE VIOLATION OF THE -**) **ANTITRUST LAWS BY**) **CONTRACT TYING AND (4)**) **NONINFRINGEMENT**

	) Date:	January 8, 2001
INDEPENDENT INK, INC.,	) Time:	10:00 a.m.
A California corporation,	) Courtroom:	11
and DOES 1 through 10	) Hon. Nora M. Manella	
	)	
Counterdefendants.	)	
	)	

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I. INTRODUCTION

This is a four part motion. The first two seek summary judgment against Trident/ITW for patent tying. The third seeks summary judgment against Trident/ITW for contract tying and the fourth is for summary judgment of non infringement on Trident/ITW's patent claim.[1]

The relevant market is ink for use in Trident's patented ink jet system. This system is protected by a number of patents, one of which is the patent on its ink reservoir and ink bottle which is the subject of Trident/ITW's single use license; its patent suit against Independent, and one of Independent's patent tying claims.

As a precondition to purchasing and selling Trident/ITW's patented system and obtaining a license under those patents, Trident/ITW's customers are only allowed to sell ink purchased from Trident/ITW. This is illegal patent tying. Because of Trident/ITW's market power, this also constitutes illegal contract tying. Because the licenses also extend to any customer of Trident/ITW, the end users are also prohibited from using ink which does not come from Trident/ITW.

Trident/ITW's single use license is a separate patent tying offense. It directly prohibits end users from purchasing non-infringing ink from anyone to refill Trident/ITW patented bottles.

As the Court may recall from the Markman hearing, this is a case wherein the defendants Trident and ITW manufacture a patented piezoelectric ink jet print head system which is then sold to original equipment manufacturers (OEMs)

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[1] This introduction does not cite to the record or legal authorities. These are contained in the sections relating to each separate ground. The introduction is intended to give the Court an overview.

who incorporate the print head system into printers for use in printing bar codes on craft paper. The printers are then sold through a network of distributors to end users who are generally large manufacturing concerns such as Proctor & Gamble. Trident/ITW also manufacture "consumables" for use with these printers. The primary consumable is specially formulated ink.

The consumables are a significant portion of Trident/ITW's revenue stream and accordingly, Trident/ITW have engaged in a comprehensive scheme or program to prevent others from selling ink for use in their patented system. They refer to these other ink manufacturers as "pirates".

Trident/ITW have made no secret of the fact that they will take whatever action is necessary to protect this all important revenue stream from the sale of their ink. Included in their program is a requirement that OEMs who purchase Trident/ITW equipment sign an agreement that those OEMs will only purchase and sell Trident/ITW ink to their customers. They enforce these contracts through threats of litigation and by threatening to withhold print heads. They have specifically done both with regard to their largest OEM customer, Marsh.

They have also utilized a patent which they have on their ink reservoir and container system to prohibit end users from refilling their Trident/ITW containers with ink from any source other than Trident/ITW.

(Trident/ITW's comprehensive plan for preventing others from competing with Trident/ITW in the market for ink to be used in conjunction with Trident/ITW's system is attached hereto as Exhibit 1.)

Trident/ITW, by virtue of one of their patents, have a legal monopoly on their reservoir and bottle or container. In addition, Trident/ITW have enjoyed a virtual monopoly in

the market for piezoelectric ink jet printers for use in carton coding (i.e. bar codes placed directly on cartons).

According to the testimony of Trident/ITW's current president, Elaine Pullen, Trident/ITW had over a 90% share of the market for industrial piezoelectric ink jet printers at the time that Trident/ITW entered into the contracts with the OEMs which require that they purchase all of their consumables from Trident/ITW.

In this litigation, Trident/ITW are attempting to assert a claim of patent infringement against Independent Ink because Independent Ink has sold refill ink to Trident/ITW customers (OEMs) and to end users of the Trident/ITW patented print head system.

While Trident/ITW originally asserted infringement of their ink formula patents against Independent Ink, they have since withdrawn that allegation in light of the Court's Markman decision.

Independent's position in this case is that Trident/ITW have engaged in a number of antitrust violations. These include:

1. Tying, in that Trident/ITW have been able to use their market power in their patented system to compel their OEM customers to sign contracts whereby they agreed to only purchase and sell Trident/ITW ink.

2. Threatening and pursuing unfounded litigation on their ink formula patents when they knew they had little or no chance of succeeding because Trident/ITW's patents could not possibly logically be construed in such a way as to cover the ink which Trident/ITW had accused of infringing. Examples of this litigation include Trident/ITW's institution of litigation against Independent Ink in Belleville, Illinois as well as their ill-fated claims in this case.

3. Threatening litigation and repercussions, such as the withholding of print heads from Trident/ITW customers

(such as Marsh), if those customers did not cease and desist from selling ink other than Trident/ITW's ink.

4. Conspiring with their OEMs to keep "pirates" from selling non-Trident ink for use in Trident/ITW's system.

5. Placing a single use only restrictive license on their patented containers, said single use license being predicated upon their patent and thereafter instituting litigation to try to enforce that single use non refill license.

6. Writing letters to OEMs and suggesting that OEMs tell their customers that Trident/ITW will prevail in litigation when they know they cannot possibly prevail because they lost the Markman interpretation they needed. These letters were written in order to keep customers from buying from Independent.

7. Conspiring with each other, when they were separate entities; to keep others, such as Marsh, from selling ink not purchased from Trident.

8. Threatening to void warranties of those who use ink other than Trident/ITW ink.

Taken as a whole, all of Trident/ITW's plan or scheme and pattern of conduct is an illegal restraint of trade. In addition, Trident/ITW's agreements with their OEMs whereby those OEMs agree to only purchase Trident/ITW ink is a conspiracy with those OEMs to establish a monopoly in violation of the antitrust laws. Further evidence of this conspiracy is the fact that ITW, subsequent to the institution of this litigation, acquired a number of Trident's former OEMs, including ITI and Foxjet, two of its larger customers. ITW already owned Loveshaw, another Trident customer. As a result, ITW has now further solidified its monopoly in this technology by bringing under its corporate umbrella Trident, Trident's patents and some of Trident's largest customers. This is of particular significance in light of the fact that there are a limited number of companies making industrial piezo-

electric ink jet printers. This is a small market and Trident/ITW are engaged in a comprehensive overall scheme and practice to consolidate ITW's power and to continue and further enhance its dominance in this market niche.

It has long been the law that one may not use a patent on one product to restrict the sale of a non-patented product intended for use with the patented product. This conduct has long been held to be a per se violation of the antitrust laws. It has never been held that market power must be shown in such a fact situation. Market power in the patented product as it relates to the non-patented product is presumed. This is true regardless of what power the patented products may have in the market in which those products compete. As far as the tied product (the ink) is concerned, it has only one market and that is the market for the patented system (Trident/ITW's patented reservoir and container).

It is undisputed that Trident/ITW have a patent on their container and reservoir; that the ink which Independent is attempting to sell is for replacement of the Trident/ITW ink once it has been consumed, and that Trident/ITW are attempting to enforce their restrictive license by alleging patent infringement against Independent. Trident/ITW are clearly in violation of the antitrust laws and this issue should be easily resolved.

Independent understands from Trident/ITW's previously filed opposition to Independent's first motion for summary judgment that it is Trident/ITW's position that the law has changed and that market power must now be shown. Independent disputes that law and will discuss its position in some detail infra.

Even if Trident/ITW's position should be upheld and the Court should decide that market power is the necessary ingredient for the antitrust patent tying cases, that should not matter in terms of the outcome of this case. As Independent will demonstrate, Trident/ITW have always had market

power in the field of industrial piezoelectric ink jet printing systems. Trident/ITW's own documents refer to Trident's "dominance" in this market niche.

The contracts that Trident/ITW have entered into with their OEM customers are illegal tying contracts, even separate and apart from their patent license provisions. Trident/ITW's market power and dominance in the industrial piezoelectric ink jet market has enabled them to impose the contract restrictions on the purchase of their ink on their customers. Indisputable evidence of this is shown by the manner in which Trident/ITW was able to force their largest customer, Marsh Industries, to cease and desist from making and selling its own inks. They did this by threatening to enforce the contract and by threatening to withhold print heads. This is shown by Trident/ITW's documents and was also was attested to by Elaine Pullen, Trident's president.

Finally, Independent is requesting summary judgment as to Trident/ITW's claims of patent infringement based on the single use license. The license is illegal and therefore cannot be enforced.

II. TRIDENT/ITW'S SINGLE USE LICENSE IS A CLEAR VIOLATION OF THE ANTITRUST LAWS.

Trident/ITW's single use license reads as follows:

> "Single Use License Under Trident Patent Rights Including U.S. Patent 5,343,226 Do Not Refill."

This is a matter of undisputed fact.

It has long been the law in this country, as clearly enunciated by the Supreme Court on numerous occasions, that it is a per se violation of the antitrust laws to use a patent on one product to restrict the sale of a non patented product for use with the patented product. *International Salt Company v. United States*, 322 U.S. 392 (1947), *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 97 S.Ct.

861, 51 L.Ed.2d 80 (1977), *United States v. Lowe's, Inc.*, 371 U.S. 38 (1962), *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L. Ed. 2d 738 (1963).

III. THE PATENT MISUSE REFORM ACT HAS NOT MODIFIED OR CHANGED THE ANTITRUST LAWS WITH REGARD TO PATENT TYING BEING A PER SE VIOLATION.

The Patent Misuse Reform Act, which is being relied upon by Trident/ITW in this case, was an amendment to the patent laws, not the antitrust laws. As was stated by Justice Brennan in his concurring opinion in *Jefferson Parish*, *supra*, p. 25:

> "As the opinion for the Court demonstrates, we have long held that tying arrangements are subject to evaluation for per se illegality under § 1 of the Sherman Act. Whatever merit the policy arguments against this long-standing construction of the Act might have, Congress, presumably aware of our decision, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation and leave the task of modifying the statute's reach to Congress. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 769, 79 L.Ed. 2d 775, 104 S.Ct. 1464 (1984) (Brennan, J., concurring). I see no reason to depart from that principle in this case and therefore join the opinion and judgment of the Court." (Emphasis added.)[2]

The Patent Misuse Reform Act involves a completely different problem than that involved in the antitrust laws. In patent law, if a person is improperly using a patent, that per-

---

[2] That case did not involve the Patent Misuse Reform Act, but the principle is equally applicable to the case at bar.

son may not enforce the patent against any party, even if the patent misuse is not directed against the party allegedly infringing the patent. In other words, a willful infringer may be able to obtain a free pass because of misconduct of the patentee directed against a third party. This often had unintended and unfair consequences. One of those abuses involves situations wherein a patentee was tying the sale of non-patented products to the sale of the patented product, in clear violation of the antitrust laws. This gave rise to situations wherein a patentee, who is engaging in improper activity with regard to one party was estopped from asserting its patents against a third party who was not selling a product for use in conjunction with the patented product, but was actually selling the patented product. Congress determined that this was an undesirable situation and therefore put restrictions on the ability of infringers who assert that particular defense. It required, as a prerequisite to asserting that particular defense of patent misuse, that the accused infringer be able to demonstrate that the patented product had market power. In making this determination, however, Congress clearly did not intend to (because it did not) create a defense to violating the antitrust laws. In other words, simply because an accused infringing third party was not able to assert tying as a defense to patent infringement, minus market power in the patented product, this did not mean that the party against whom the patent tying arrangement was directed would be without recourse. If Congress had so intended, Congress could, would and should have done so.

The fact of the matter is that no court anywhere has ever held that the Patent Misuse Reform Act is a defense to an allegation of violating the antitrust laws because of patent tying.

This issue was addressed subsequent to the passing of the Patent Misuse Reform Act in *Mallinckrodt v. Medipart*, 976 F.2d 700 (Fed. Cir. 1992) wherein the Court stated on page 78 of its opinion:

"However, this is not a price fixing or tying case, and the per se antitrust and misuse found in the Bauer trilogy and Motion Picture Patents are not here present. ..." (Emphasis added.)

IV. IN ANY EVENT, TRIDENT/ITW CLEARLY HAS HAD MARKET POWER AT ALL RELEVANT TIMES.

First of all, market power is presumed. As stated by the Court in *Jefferson Parish*, supra, on page 15:

"For example, if the government has granted the seller a patent or similar monopoly over a product, it is fair to *presume* that the inability to buy the product elsewhere gives the seller market power. ... *United States v. Lowes, Inc.*, 371 U.S. 38; 9 L.Ed.2d.11; 83 S.Ct. 97. Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the markets for a second product will undermine competition on the merits in that second market." (Emphasis added.)

In *U.S. v. Lowe's*, supra, the Supreme Court stated on pages 18 and 19:

"The requisite economic power is presumed when the tying product is patented or copyrighted. ...

These cases reflect a hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products. The patentee is protected as to his invention, but may not use his patent rights to exact tribute for other articles." (Emphasis added.)

In addition, Trident/ITW have actual market power. Trident pioneered, developed, patented and created a market for industrial piezoelectric ink jet printers which can be used in lieu of printed labels which are more expensive, clumsy, etc.

Trident/ITW have enjoyed a "dominant" power in this market, including upwards of 90% of the market share, during the time that their customers were required to enter into tying agreements whereby they would only use Trident products, including Trident inks in conjunction with that technology.

Elaine Pullen testified in her August 22 deposition as follows: (P. 18, l. 25 - p. 19, l. 9.)

> Q. All right. Let's go to paragraph 15 again. It says "The option to purchase alternative inks by Marsh and other OEMs to reduce their cost of consumables is severely restricted by Trident." Do you know whether or not that statement is true?
>
> A. I believe the statement is untrue because the OEMs have all signed an agreement to purchase their ink from Trident. They would be in breach of that agreement if they were — after having signed it to purchase their ink from somebody else. (Emphasis added.)

See also the Customer Information Bulletin sent to Trident/ITW's customers (Exhibit 2).

> "... Please note, in particular, that under no circumstances does anyone other than Trident have any license or rights to supply you with ink for Trident products. ..." (Emphasis in original.)

The contracts with the OEMs are perpetual (Elaine Pullen deposition, p. 150, 11. 20 - 22.). A copy of Trident's contract with Markpoint, Printer AB, which is representative of all the contracts entered into between Trident and its customers is attached hereto (Exhibit 3).

Elaine Pullen further testified in her deposition on p. 267, 11. 1 - 9 as follows:

Q. Okay. Do you have any idea what percentage of piezo ink jet engines were provided by Marsh at that time — I'm sorry — by Trident at that time?

A. Well, what's that time? This is —

Q. 1997.

A. Well, the report is written in '97. I'm not sure it would be on '97 data, so it goes back to '96 where we would have had over 90 percent of them for industrial printing I'd expect. (Emphasis added.)

In *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), the United States Supreme Court stated on page 571:

"*In American Tobacco Co. v. United States*, 328 U.S. 781, 797, we said that 'over two-thirds of the entire domestic field of cigarettes, and... over 80% of the field of comparable cigarettes' constituted a 'substantial monopoly.' *In United States v. Aluminum Co. of America*, 148 F.2d 416, 429, 90% of the market constituted monopoly power. In the present case, 87% of the accredited central stat n service business leaves no doubt that the congeries of these defendants have monopoly power—which, as our discussion of the record indicates, they did not hesitate to wield..."

In Universal Analytics, Inc. v. MacNeal-Schwendler Corporation, 914 F.2d 1256 (9th Cir. 1990) the Ninth Circuit Court of Appeals stated on page 1257:

"At all times relevant to this suit, MSC had approximately 90 percent of the market, and UAI, which entered the market in the early 1980s, about five percent. Thus, we assume the first element of a section 2 claim was met."

In her deposition testimony of August 22, Elaine Pullen acknowledged that all but one of the significant OEM con-

tracts were entered into before she became president of the company (which was in the 1995 time period when Trident clearly had over 90% of the market). Elaine Pullen deposition, p. 151, l. 22 - p. 152, l. 19.

Included in Trident/ITW internal documents are the following:

Exhibit 4: Monthly Management Report for January 1997, Technical Barriers to Entry

> **"Barriers to entry of a competitor into Trident's markets are considerable.** Our technology required an initial investment of approximately $20m and at least $10m of on-going R&D and process development. This work resulted in an extensive portfolio of patents and confidential know-how. All of the impulse ink jet printheads on the market today required similar or higher investments. ...
>
> The impact that Trident can dictate on individual customers and/or this market is extremely massive. We are in the driver's seat, at this time." (Emphasis added.)

Exhibit 5: Investment Highlights

> "Dominant market position focused on industrial applications." (Emphasis added.)

Exhibit 6: Trident International, Inc. 1998 Marketing Plan

> "Trident dominates the impulse ink jet printhead market." (Emphasis added.)

Exhibit 7: Trident, Inc. Presentation to the Board of Directors.

"*Trident is the leader in piezo-electric ink jet.* Trident is the technology leader in an increasingly important segment of the overall ink jet market, with a dominant market share and a broad patent portfolio." (Emphasis added.)

Exhibit 8: Trident International Company Report Impulse Ink Jet Market Growing 40% - Trident Dominates.

"Trident is the technology and market leader in the emerging impulse ink jet market, particularly in industrial applications such as carton coding." (Emphasis added.)

Exhibit 9: Trident International, Inc./NASDAQ (TRDT):

"Based on conversations with Trident management and with a sampling of its OEM customers, ... Only Trident supplies the (patented) ink jet sub systems that provide the high resolution for readability of barcodes required by Walmart and other retailers. As two VARs put it, 'Trident is the only game in town for both ink jets and ink." (Emphasis added.)

Exhibit 10: Marketing Plan 199293 Trident, Inc.

> "Fortunately at this juncture, no viable technology that offers the same capabilities as Trident's Imaging Subsystem are available for industrial applications." (Emphasis added.)

ITW has made it clear to at least one of Trident/ITW's OEMs (Marsh — Trident's largest customer) that Trident/ITW does not view violations of its contract lightly and that it has the resources and the will to enforce its contracts. They also threatened to withhold printheads. Attached hereto as Exhibit 11 is an internal memorandum of Trident which, taken in conjunction with the deposition testimony of Elaine Pullen, p. 227, l. 8 - p. 228, l. 8; p. 229, l. 6 - p. 230, l. 6, demonstrate ITW's attitude, policy and abilities in this regard. In that memorandum it states:

> "Date: January 22, 1999, From: Elaine Pullen, Subject: Visit Report: Videojet Systems Intl., January 21, 1999, ... Valerie again stated that ITW has considerable legal resources as compared to Trident and that they have started a thorough legal review and will take appropriate action to stop Graphic Controls. ... Valerie also stated again that ITW does not allow contracts to be breached

and although our desire is to avoid a legal action, an injunction and damages are the likely outcome. ITW would also, if pressed, discontinue the supply of printheads to Videojet and Marsh." (Emphasis added.)

It was as a direct result of these threats that Marsh decided to stop manufacturing its own ink, but rather to allow Trident to make its ink for it and to sell it to Marsh. (Exhibit 12 attached hereto.)

" ... Purpose: ... Discussion: ... 2. Ink

Trident agreed to supply Videojet/Marsh with both the AD1 ink and Trident ink." (Emphasis in original.)

The fact that these contracts were forced upon their customers was demonstrated by the manner in which Trident/ITW was able to back down Marsh, their largest customer when Marsh attempted to sell its own ink.[3]

V. TRIDENT/ITW'S OEM CONTRACTS CONSTITUTE ILLEGAL PATENT TYING.

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[3] It should be noted that these threats were made by ITW in the presence of Elaine Pullen, who was then president of Trident, before the acquisition of Trident by ITW, when Trident and ITW were separate publicly traded entities. Elaine Pullen deposition, p. 227, l. 18-25:

Q. The next sentence says "Valerie again stated that ITW has considerable legal resources as compared to Trident." What was her purpose in saying that, if you know?

A. Well, the timing of this meeting was actually, I think, just prior to the acquisition by ITW and I think it was merely to remind Marsh that ITW had every intention of standing behind its rights.

ITW then went on to acquire ITI and FoxJet. Clearly ITW has an overall plan to monopolize this industry and it conspired with Trident to do so.

The OEM agreements specifically state:

"LICENSE GRANT/APPLICATIONS/FIELD OF USE (LICENSED PRODUCTS) To manufacture, use and sell equipment employing and including ink jet printing devices supplied by TRIDENT when used in combination with ink and ink supply systems supplied by TRIDENT and under now existing Trident patents and related TRIDENT Technical Information and copyrights and mask work registrations (if any) (Licensed Products) in the following application(s) and field(s) of use: ... (Emphasis added.)

In paragraph 3 of the Standard Terms and Conditions it states:

"The license and rights granted to BUYER hereunder to make, use and sell LICENSED PRODUCTS shall also extend to any customer of BUYER purchasing or otherwise acquiring the LICENSED PRODUCT from BUYER . . ."

For all of the same reasons set forth regarding the single use license, this is an illegal patent tying contract.

VI. TRIDENT/ITW's OEM CONTRACTS ARE PER SE VIOLATIONS OF THE ANTITRUST LAWS IN THAT THEY CONSTITUTE TYING BY A PARTY WITH MARKET POWER.

As shown by the evidence presented above, Trident/ITW clearly had overwhelming market power when the OEM contracts were entered into between Trident and the OEMs. Market power is determined by a variety of factors, including market share and the ability to affect markets. *Carter v. Veriflex, Inc.*, 101 F.Supp. 2d 1261, 1267 (C.D. Ca. 2000). Any party having market power in one product who uses that power to tie sales of another product is guilty of a per se violation of the antitrust laws. *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F. 3d 1421, 1424 (9th Cir. 1995); *The Mozart Company, v. Mercedes-Benz of North America*, 833 F.2d 1342, 1345 (9th Cir. 1987). Here Trident has, through its

contracts, tied the sale of consumables (ink) to sales of its patented ink jet systems. This is a per se violation of the antitrust laws.

VII. THE RELEVANT MARKET IS NOT ALL THE TECHNOLOGY WITH WHICH TRIDENT/ITW'S PATENTED TECHNOLOGY COMPETES.

Based on Trident/ITW's previous papers, Independent anticipates that Trident/ITW will assert that the relevant market is all printing systems, including, label printing. This is not the relevant market. The issue here is whether only Trident/ITW will be allowed to sell non-patented ink for use in their patented system. Independent is not being prevented from selling ink for other systems by Trident/ITW's conduct nor are end users and OEMs being prevented from buying ink from others for non Trident/ITW systems. As Trident/ITW made clear in their Markman hearing papers, the inks for use in their system must be specially formulated. Independent has developed a formula that works in Trident/ITW systems and Trident/ITW do not want that ink purchased by anyone.

VIII. TRIDENT/ITW'S CONDUCT HAS CAUSED ANTITRUST DAMAGE.

While it is not necessary for a per se violation of the antitrust laws, it is nonetheless true that Trident/ITW has clearly caused damage to competition in that their prices for ink are substantially higher than those charged by Independent Ink and others. Attached hereto as Exhibit 13 is a document first produced by Trident/ITW on September 19, 2000. This document clearly shows the disparity between the prices charged by Trident/ITW and those charged by others, including Independent Ink.

IX. TRIDENT/ITW CANNOT MAINTAIN AN ACTION AGAINST INDEPENDENT INK BASED UPON THE SINGLE USE - DO NOT REFILL LICENSE.

Trident/ITW's remaining patent infringement claim is based entirely upon, its illegal tying single use license which it has placed upon its patented containers.

Mallinckrodt v. Medipart, supra, made it clear that a single use license may not be enforced if that license is an illegal tying license which constitutes a per se violation of the antitrust laws.

On page 708 of its opinion, the Court stated:

> "However, this is not a price fixing or tying cage, and the per se antitrust and misuse found in the Bauer trilogy and Motion Picture Patents are not here present.

The appropriate criteria is whether *Mallinckrodt's* restriction is reasonably within the patent grant, or whether the patentee has ventured beyond the patent grant and into behavior having an anticompetitive effect not justifiable under the rule of reason. . . . Should the restriction be found to be reasonably within the patent grant, i.e., that it relates to subject matter within the scope of the patent claims, that ends the inquiry. However, should such inquiry lead to the conclusion that there are anticompetitive effects extending beyond the patentee's statutory right to exclude, those effects do not automatically impeach the restriction. Anticompetitive effects that are not per se violations of law are reviewed in accordance with the rule of reason." (Emphasis added.)

X. CONCLUSION.

Trident/ITW have engaged in a blatant, illegal antitrust tying; conspiracy; product withholding; litigation filing; customer threatening, false publications scheme to preserve their ink revenue stream. Virtually any one of the acts in which Trident/ITW have engaged to preserve their monopoly would subject them to the appropriate penalties under the antitrust laws. The combination of all of these elements constitutes a widespread thorough and completely reprehensible attempt to force any and all competition out of the market which ITW

and its division, Trident, dominate. Independent Ink and any other ink manufacturer have the right to sell ink which can be used in the Trident system. Likewise, Trident/ITW's customers (their OEMs) and the customers of those customers (end users) have every right to purchase ink from sources other than Trident/ITW. Trident/ITW's conduct is motivated by nothing more than greed and shows a blatant disregard and disrespect for the laws of this country as well as basic principles of fairness.

While these issues may seem academic when presented on paper, the reality is that a small company, like Independent Ink, has an extremely difficult time surviving in this market. By throwing every road block conceivable in its path, Trident/ITW have basically hoped to drive Independent Ink (and others) out of this market entirely. The mere fact that they have instituted completely specious litigation alleging infringement of their ink patent is in and of itself evidence of Trident/ITW's vicious attitude towards their competitors. This is further exemplified by the manner in which Trident/ITW threatened Marsh Industries, their largest customer. If they didn't have market power they would never dare to threaten their largest customer in this manner. They threatened litigation as well as retribution in the form of withholding print heads.

It is respectfully submitted that summary judgment should be entered against Trident/ITW and in favor of Independent Ink on both patent tying cases as well as tying through Trident/ITW's contracts with their OEMs.

Because the patent tying arrangement is a per se illegal restraint of trade as described in Mallinckrodt, supra, it is unenforceable and Trident/ITW may not maintain an action for patent infringement against Independent based upon that "single use do not refill" license. Accordingly, summary judgment should be issued in favor of Independent on this issue as well.

Dated: Oct. 20, 2000

Respectfully submitted,

STRADLING, YOCCA,
CARLSON & PAUTH

/s/ EDWARD F. O'CONNOR
Edward F. O'Connor
Attorneys for Plaintiff

Exhibit 1

CONFIDENTIAL

Protection of Trident's Consumable Business

Trident has taken various actions and precautions to assure a continued consumables business for Trident. These actions and precautions are outlined below:

A. Ink Patent Portfolio

Trident has obtained and maintained an extensive ink patent portfolio. To the extent possible, Trident has sought and obtained patent coverage with the broadest possible claims for the various inks that Trident's customer use. The claims of these patents are not directed to narrow formulations but rather, in most cases, broad recitations of characteristics and compositions necessary to provide compatibility with Trident printheads while achieving good jetting and marking performance.

B. Ink Supply Patent Coverage

Trident has obtained U.S. patent coverage on the Trident ink supply system in the form of U.S. Patent 5,343,126 ("the '226 patent') and an application still pending in the U.S. Patent & Trademark Office which will provide additional claim coverage. Based on this patent coverage, Trident marks its ink supply containers which include a bottle and valued cap with a notice of a single use license under the '226 patent of the type sanctioned by the Federal Circuit Count of Appeals in the Mallinckrodt case which forms Attachment A. By using such a license, Trident has a cause of action for patent infringement by a customer or a third party who refills the bottle with non-Trident ink. The patent also gives Trident a cause of action against a third party or customer who makes or sells another bottle with a valued cap covered by the claims of the patent and fills that bottle with non-Trident ink.

C. Sales and License Agreement Requires Use of Trident Ink

A standard Trident Sales and License Agreement is signed by all customers. Under the terms of this agreement, Trident's customers receive a grant of a license to use Trident printheads and other Trident supplied apparatus which is covered by the Trident patents. The license grant is only valid if Trident supplied ink and other consumables are used in or with the patented Trident apparatus. If a Trident customer or a customer of a Trident customer uses non-Trident ink or other consumables, Trident has a case of action for patent infringement against such a customer or a customer of a customer since that activity is unlicensed and filing such a bottle with non-Trident ink infringes. Trident also has a cause of action against anyone selling ink to Trident's director indirect customers for inducing a breach of Trident's Sales and License Agreement which requires the purchase of ink and other consumables from Trident.

Exhibit 2

Trident, Inc.
1114 Federal Road
Brookfield, CT 06804-1140
(203) 740-9333 Fax: (203) 775-9668

December 27, 1994

CUSTOMER INFORMATION BULLETIN
#101

TRIDENT AGREEMENT WITH MICROPORE

The purpose of this bulletin is to explain and clarify the current relationship between Trident, Inc. and Micropore, Inc. for the supply of inks previously purchased from Porelon.

Micropore, Inc. purchased Porelon, Inc. from Johnson Worldwide Associates in June 1994. Prior to the divestiture of Porelon by Johnson Worldwide Associates. Porelon supplied Trident with several of our most popular inks in bulk quantity. Trident repackaged these inks for sale to our customers. The ink formulations were developed by Trident, and Porelon acted as a vendor in this arrangement.

The current arrangement is as follows:

- Trident will purchase from Micropore those inks that were previously purchased in bulk from Porelon and:
- Micropore has the right of first refusal to supply other Trident inks with a certain minimum anticipated volume, at a competitive price.
- Micropore cannot se [sic] make ink, directly or indirectly, for Trident's customers anywhere in the world.
- Micropore has no rights to Trident inks other than to manufacture bulk ink under the conditions defined above. Trident packages and labels these inks into bottles and cartridges at our Brookfield, Connecticut facility.

We hope that this provides you with a clear understanding. Please note, in particular, that under no circumstances does *anyone* other than Trident have any license or rights to supply you with ink for Trident products.

We also request anyone finding ink being sold as "Trident compatible" by companies other than Trident and its customers, to provide details and samples to Trident so that we can evaluate the product for potential patent infringement and incompatibility.

Exhibit 3

Trident, Inc.
1114 Federal Road
Brookfield, CT 06384
(203) 740-9333 Fax (203) 775-9668

TRIDENT, INC.

SALES AND LICENSE AGREEMENT

WITH

MARKPOINT, PRINTER AB

Agreement N. 141

EVERY TERM OF THIS AGREEMENT IS IMPORTANT.
READ EACH OF THEM CAREFULLY.

Definitions:

"TRIDENT" shall mean TRIDENT, Inc.
"AGREEMENT" shall mean this Sales And License Agreement.
"BUYER" shall mean the purchaser identified below.
Other words with special meaning in this Agreement, generally capitalized words, shall have the meaning detailed in the OTHER DEFINITIONS section of pages 9, 10 and 11 of this Agreement.

By signing this document, you agree to be bound by the STANDARD TERMS AND CONDITIONS OF SALE attached, which are an integral part of this form Agreement. All sales of TRIDENT Apparatus for incorporation in certain equipment assembled, used or sold by a Buyer for certain applications include royalty-free, nonexclusive, nontransferable rights under certain proprietary rights of TRIDENT. The specific equipment and applications ("Licensed Products") for Buyer are as specified in the 'LICENSE GRANT/APPLICATIONS/FIELD OF USE."

LICENSE GRANT/APPLICATIONS/FIELD OF SUE (LICENSED PRODUCTS)

To manufacture. use and sell equipment employing and including ink jet printing devices supplied by TRIDENT when used in combination with ink and ink supply systems supplied by TRIDENT and under now existing Trident patents and related TRIDENT Technical Informaiton and copyrights and mask work registrations (if any) (Licensed Products) in the following application(s) and field(s) of use:

Trident Product Type:	Ultrajec™ Imaging subsystems – including all commercially available configurations and associated electronics.
Trident Ink Type:	All commercially available ink.
Application/Field of Use:	The on-line/off-line coding and marking of packages and products. postal marking (mailing and addressing).
Geographical Limitations:	Those groups of countries which make up the EEC and EFTA trading blocks as of 1 May 1993. The United States of America. Canada.

NOTE: NO LICENSE UNDER ANY FUTURE ISSUED TRIDENT PATENTS OR RELATED TECHNICAL INFORMATION OR FUTURE COPYRIGHTS OR MASK WORK REGISTRATION IS PROVIDED BY THIS AGREEMENT EXCEPT TO THE EXTENT NECESSARY TO MAKE.

USE AND SELL LICENSE PRODUCTS INCORPORATING THE TRIDENT APPARATUS SUPPLIED BY TRIDENT PURSUANT TO THE TERMS HEREOF.

This agreement, including the Standard Terms and Conditions of Sale on pages 3 through 11 of this Agreement Form, constitute the entire Agreement between the Parties hereto and supersedes all proposals, oral or written, and all previous negotiations and other communications between the Parties. The Standard Terms and Conditions of Sale of this Agreement cannot be modified or waived except in writing signed by the Parties hereto and waiver by TRIDENT or Buyer of any provision hereof in any one instance shall not constitute a waiver as to any other issuance. If a provision of this agreement is invalidated for any reason, this Agreement remains binding except for such invalid provision. This Agreement shall be construed in accordance with and governed by the laws of the State of Connecticut. This agreement may be signed in several counterparts each of which shall be deemed an original.

IN WITNESS WHEREOF, the Parties hereto with the intent to be legally bound, have caused duly authorized personnel of their respective corporaneous to execute this Agreement effective the 27th [sic] of August, 1993

_____ TRIDENT, INC.

Company

By: _____ By:_____

Title: _____ Title: _____

ACCEPTANCE OF THIS ORDER IS CONDITIONED ON YOUR ASSENT TO THIS ENTIRE AGREEMENT

STANDARD TERMS AND CONDITIONS OF SALES

1. OFFER: GOVERNING PROVISIONS
The writing constutes an offer by TRIDENT to sell the products and/or services described on page one in accordance with these terms and conditions, and is expressly conditioned upon assent to these terms and conditions.

No additional or different terms or conditions will be binding upon TRIDENT unless specifically agreed to in writing; failure of TRIDENT to object to provisions contained in any purchase order or other communication from BUYER shall not be construed as a waiver of those terms and conditions nor an acceptance of any such provisions. This Agreement and these terms and conditions shall constitute the entire agreement between TRIDENT and BUYER, and shall be governed by the laws of the State of Connecticut.

2.a. BUYER'S PRE-ORDER INSPECTION AND ACCEPTANCE
BUYER acknowledges that prior to its order it inspected the TRIDENT Aparatus inlcuding documentsion related thereto and had an adequate opportunity to test the TRIDENT Apparatus for BUYER's intended use. BUYER acknowledges that it accepts the TRIDENT Apparatus for BUYER'S INTENDED USE.

2.b. JETWRITE™ AND HIDEF™ WARRANTY AND REPAIRS
TRIDENT Apparatus, including TRIDENT consumable supplies, for a period of one (1) year from the date of shipment thereof by TRIDENT, under normal use and service, and when employed in accordance with TRIDENT Technical information, will be free from defects to materials and workmanship. TRIDENT will, without charge, within thirty (30) work-

ing days of receipt of the defective TRIDENT Apparatus, repair or replace, at its sole option the TRIDENT Apparatus or parts (normal wear and tear excluded) which are determined to be defective within the warranty period and which are returned to TRIDENT freight *prepaid*, F.O.B. factory of origin (or other TRIDENT repair facility as may be designated by TRIDENT), provided the TRIDENT Apparatus or part thereof has not been damaged, subjected to excessive duty cycle, misuse or abnormal operations, or altered or improperly installed, repaired or maintained by BUYER or others in a manner which TRIDENT reasonably determines to have adversely affected performance or reliability. In the event that TRIDENT Apparatus returned under warranty is in good working order or evidence of ink not supplied by TRIDENT, is found in the TRIDENT Apparatus, a sixty dollar ($60) evaluation fee will be charged to BUYER by TRIDENT.

2.c. FASTDRI™ AND HIDEF™ WARRANTY AND REPAIRS

TRIDENT Apparatus, including TRIDENT consumable supplies for a period of 180 days from the date of shipment thereof by TRIDENT, under normal use and service, and when employed in accordance with TRIDENT Technical information, will be free from defects to materials and workmanship. TRIDENT, will, without charge, within thirty (30) working days of receipt of the defective TRIDENT Apparatus, repair or replace, at its sole option the TRIDENT Apparatus or parts (normal wear and tear excluded) which are determined to be defective within the warranty period and which are returned to TRIDENT, freight prepaid, F.O.B. factory of origin (or other TRIDENT repair facility as may be designated by TRIDENT), provided the TRIDENT Apparatus or part thereof has not been damaged, subjected to excessive duty cycle,

misuse or abnormal operation, or altered or improperly repaired or maintained by BUYER or others in a manner which TRIDENT reasonably determines to have adversely affected performance or realiability. In the event that TRIDENT Apparatus returned under warranty is in good working order or evidence of ink not supplied by TRIDENT found in the TRIDENT Apparatus, a sixty dollar ($60) evaluation fee will be charged to BUYER by TRIDENT.

THE ABOVE WARRANTY DOES NOT COVER TRIDENT INK JET PRINTING DEVICES REPAIRED, REFURBISHED OR OTHERWISE DIASSEMBELED BY PERSONS NOT CERTIFIED BY TRIDENT IN A MANNER SO AS TO BREACH THE FLUID PATH OR DAMAGE TO TRIDENT INK JET PRINTING DEVICES CAUSED BY THE USE OF INK OR SPARE PARTS NOT SUPPLIED BY TRIDENT OR DAMAGE TO TRIDENT INK JET PRINTING DEVICES CAUSED BY FAILURE TO USE TRIDENT AUTHORIZED PROCEDURES AND PROCESSES.

Warranty claims hereunder must be made promptly in writing, stating the nature and date of the failure, the TRIDENT Apparatus serial number, if applicable, and mustbe received by TRIDENT within the applicable warranty period. Notification by telex, facsimile or TWX is an acceptable form of notification for those failures that occur during the latter stages of the warranty period.

The above warranty extends solely to BUYER and all warranty claims must be made by BUYER and not by customer or other successors of BUYER. Repair or replacement of parts or TRIDENT Apparatus shall neither extend nor decrease the original warranty period.

2.d. LIMITATION OF TRIDENT'S LIABLITY: DISCLAIMERS
TRIDENT'S liability is limited to and BUYER'S sole and exclusive remedy for breach of warranty shall be

the repair or replacement of the defective TRIDENT Apparatus or part and does not include any lable related to the subsequent installation thereof. TRIDENT Apparatus or parts repaired or replaced by TRIDENT will be shipped to BUYER F.O.B. destination, freight prepaid within the continental United States (F.O.B. TRIDENT's factory, freight collect, outside the continental United States).

DISCLAIMER OF IMPLIED WARRANTIES

THE EXPRESS WARRANTIES MADE IN THIS AGREEMENT ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OF MERCHANTABILITY.

2.e. EXCLUSION OF CONSEQUENTIAL DAMAGES AND LIMITATION OF OTHER LIABILITY; BUYER'S WARRANTY

TRIDENT's liability with respect to breaches of warranty shall be limited as provided in paragraph 2 hereof. With respect to other breaches of the Agreement, TRIDENT's liability shall in no event exceed the contract price. TRIDENT SHALL NOT BE SUBJECT TO AND DISCLAIMS: (1) ANY OTHER OBLIGATIONS OR LIABILITIES ARISING OUT OF BREACH OF CONTRACT OR OF WARRANTY (2) ANY OBLIGATIONS WHATSOEVER ARISING FROM TORT CLAIMS INCLUDING NEGLIGENCE AND STRICT LIABILITY OR ARISING UNDER OTHER THEORIES OF LAW WITH RESPECT TO GOODS SOLD OR SERVICES RENEDERED BY TRIDENT, OR ANY UNDERTAKINGS, ACTS OR OMISSIONS RELATING THERETO, AND (3) ALL CONSEQUENTIAL INCIDENTAL AND CONTINGENT DAMAGE WHATSOEVER. Without limiting the generality of the foregoing, TRIDENT specifically

disclaims any liability for penalities (including administrative penalities) special or punitive damages. damages for lost profits or revenues, loss of use of goods or any associated equipment, cost of capital. facilities or services, downtime, shut-down or low-down costs, or for any other types of economic loss. All th elimitations and disclaimers contained in this paragraph and in the rest of this Agreement sha!l apply to claims of BUYER'S customers or any third party as well as to claims of BUYER. Unless this Agreement is amended pursuant to paragraph 8, BUYER understands that he is foregoing the possibility of, among other things. recover from TRIDENT of tort liability. BUYER shall indemnify TRIDENT against any and all losses. liabilities. damages and expenses (including, without limitation attorneys' fees and other costs of defending any action) which TRIDENT may incur as a result of any claim by BUYER or others arising out of or in connection with the goods or services sold hereunder and based on goods or service defects not proven to have been caused solely by TRIDENT's negligence. BUYER understands and agrees that the sole and exclusive remedies for breach of any and all warranties and the sole remedies for TRIDENT's liability of any kind including liability for negligence with respect to the TRIDENT Apparatus or related spare parts or services covered by this Agreement and all other performance by TRIDENT udner or pursuant to this Agreement shall be limited to the remedy of repair or replacement as provided herein.

3. LICENSES AND ASSIGNMENT

The license identified in the LICENSE GRANT/APPLICATIONS/FIELD OF USE on page 1 to BUYER is royalty-free, nonexclusive and non transferable. The license and rights granted to

BUYER hereunder to make, use and sell Licensed Products shall also extend to any customer of BUYER purchasing or otherwise acquiring the Licensed Product from BUYER but only with respect to the particular Licensed Product so purchased or acquired from BUYER. BUYER hereby afrees to assign to TRIDENT all of its interest in any proprietary rights including inventories and resulting patents and patent applications and confidential technical information comprising improvements in or technology relating to the TRIDENT Apparatus.

No rights or licenses, expressed or implied, are granted hereunder except those expressly acknowledges and agrees that no right or license is granted hereunder in connection with rotary printing or the use of the TRIDENT Apparatus in any rotary printing device or for any rotary printing application. As used herein, the term "rotary printing" shall mean a printing system wherein a sheet of paper is printed upon by means of a rotating print based which ahs a number of ink jets located about an axis, and wherein the surface of the paper which is to be printed upon is generally curved around the print head, and wherein the axis about which the paper is curved lies generally in the same direction as the axis about which the ink jets are located.

4.a. INTELLECTUAL PROPERTY INFRINGEMENT TRIDE [SIC] BASIC OBLIGATION – BUYER'S OBLIGATION TO PROVIDE NOTICE AND TO ASSIST.

TRIDENT agrees, as its own expense, to defend BUYER is any suit, claim or proceeding brought against BUYER alleging that TRIDENT Apparatus purchased by BUYER from TRIDENT infringes a patent, copyright, mark work registration or trade secret right or another PROVIDED, however, that BUYER (a) promptly after BUYER learns of any

such suit, claim or proceeding, notifies TRIDENT, in writing, of such suit, claim or proceeding, such that TRIDENT received written notice ten (10) days of BUYER's first learning of any such suit, claim or proceeding; (b) gives TRIDENT full information and assistance (at BUYER's expense) required for TRIDENT to defend such suit, claim or proceeding, and (c) allows TRIDENT at TRIDENT's expense, to direct the defense including selection of counsel and negilgence of any settlement.

BUYER AGREES THAT FAILURE TO GIVE THE NOTICE DESCRIBED HEREIN WITHIN THE TIME STATED OR TO GIVE THE DESCRIBED ASSISTANCE MEANS THAT TRIDENT WILL HAVE NO OBLIGATION TO DEFEND BUYER AGAINST ANY SUIT, CLAIM OR PROCEEDING. Further, TRIDENT agrees to pay any Judgment, rendered in such by final judgment of a court of last resort.

4.b. LIMITATION OF TRIDENT'S OBLIGATION

Notwithstanding anything in this Agreement, TRIDENT shll have no liability to indemnity BUYER in any suite, claim or proceeding brought against BUYER in which the alleged infringement is based upon the making, using or selling of any assembly of which the TRIDENT Apparatus is a part and does not, by itself directly infringe, or where the alleged infringement is based upon modification of the TRIDENT Appratus as originally supplied by TRIDENT, or where the alleged infringement is based upon the making, using or selling, in conjunction with TRIDENT Apparatus, of equipment or materials not provided by TRIDENT.

4.c. TRIDENT NEED NOT REPLACE ENJOINED TRIDENT APPARTUS

BUYER AGREES THAT TRIDENT HAS NO OBLIGATION TO PROVIDE NON-INFRINGING REPLACEMENT FOR ANY ENJOINED TRIDENT APPRATUS OR TO OBTAIN A LICENSE TO INSURE BUYER'S CONTINUED USE OF ANY ENJOINED TRIDENT APPARATUS.

4.d. BUYER'S RESPONSIBILITY

With respect to any other claim, suit or action for ingement of patents, copy rights, mask work protection certificate or trade secret rights brought a BUYER, which claim, suit or action results from BUYER's making, using, and selling the Licensed Product, BUYER shall at its own expense defend any such claims, suits or actions, and at its own expense pay any damages or other sums which may be assessed or may become payable under any final decree or judgment in any such claim, suit or action or under any settlement thereof.

4.e. BUYER'S RESPONSIBILITY TO TRIDENT

BUYER shall, at its own expense, defend TRIDENT in any claim, suit or proceeding brought against TRIDENT alleging that (i) the Licensed Product or changes, modifications or enhancements made by BUYER to TRIDENT Apparatus or to TRIDENT Technical Information, or (ii) any item excluded from TRIDENT's obligation to indemnify set forth in the first paragraph of this paragraph 4, infringes any patent or copyright or trade secret or mask work registration or other proprietary-right of any third party. BUYER shall pay any judgment against TRIDENT rendered by the final judgment of a court of last resort based upon any such allegation(s) in such suit or proceeding, provided that TRIDENT (i) promptly notifies BUYER in writing of any such claim and gives BUYER the opportunity to defend or settle any such claim at BUYER's expense and (ii) cooperates with

BUYER, at BUYER's expense, in defending or settling such a claim.

4.f. TRIDENT NOT RESPONSIBLE FOR CERTAIN KINDS OF DAMAGE

TRIDENT SHALL IN NO EVENT BE RESPONSIBLE OR LIABLE FOR CONSEQUENTIAL, SPECIAL, INDIRECT OR PUNITIVE DAMAGES. THE FOREGOING STATES THE ENTIRE LIABILITY OF TRIDENT AND BUYER WITH RESPECT TO INTELLECTUAL PROPERTY INFRINGEMENT.

5. EXCUSED PERFORMANCE

Neither party shall be responsible to the other for failure to perform any of the obligations (other than the obligations to pay money) imposed by this agreement, provided such failure shall be occasioned by fire, flood, explosion, lighting, windstorm, earthquake, subsidences, of soil, failure or destruction, in whole or in part, of machinery or equipment, discontinuity in the supply of power, governmental interference, civil commotion, riot, war, strikes, labor disturbance or by any cause beyond the reasonable control of the party in question.

6. CONFIDENTIALITY

BUYER agrees to maintain TRIDENT's Confidential Technical information (including but not limited to data, plans, specifications, designs and drawings) in confidence from the time of disclosure, and to use reasonable efforts to prevent the disclosure thereof to others including Affiliates except (a) in confidence on a need-to-know-basis, (b) only to individuals and entities which have agreed in Writing to maintain such Confidential Technical Information in confidence, and (c) only to the extent necessary for BUYER to make, sue and sell Licensed Products. With respect

to the above, TRIDENT agrees to supply BUYER with and allow the BUYER to use such technical information as is necessary to enable BUYER to produce BUYER's technical manuals for Licensed Product. However, so Confidential Technical Information of TRIDENT may be incorporated in the manuals.

7. TERMS OF PAYMENT

Invoices for TRIDENT Apparatus shall be rendered upon shipment. Paymen tof these and all other invoices shall bemade in fully thirty (30) days from date of invoice paid in U.S. dollars drawn on a U.S. bank and TRIDENT may, at its option, require that such payments be secured by letters of credit. Any payment not made on or before its due day will be subject to any annual interest charge of the lesser of (a) eighteen percent (18%), (b) one percent (1%) above the average of the daily prime rate of Citibank N.A. (New York), or (c) the maximum rate permitted by law.

8. PRICES

All prices quoted are subject to change, with ninety (90) days notice in writing. If there is a delay in completion of shipment of BUYER'S order, due to any change requested by BUYER or as a result of any delay on BUYER's part in furnishing information required for completion of the order, the price in effect at time of acceptance of order is subject to the charge.

9. SHIPPING, DELIVERY AND PACKAGING

All prices are F.O.B. TRIDENT's shipping dock. The mode of transportation shall be designated by BUYER and may be revised by written notices received by TRIDENT at least (10) working days prior to the scheduled delivery date. Purchase Orders without specific shipping instructions will be trans-

ported consistent with the nature of the equipment and the hazards of transportation of the material.

BUYER agrees that shipments shall be taken in accordance with the delivery schedule TRIDENT quotes to BUYER. The lead times specified and the delivery schedule quoted by TRIDENT are the best estimate possible, based on current and anticipated factory loads, of when TRIDENT Apparatus will be shipped. TRIDENT assumes no liability for loss, damage or consequential damage due to delays.

The prices specified include cost of commercial packaging adquate for shipment by air or land surface carriers. Special packaging required by BUYER for shipment by other modes shall be quoted by TRIDENT on request.

10. TAXES

TRIDENT'S prices for TRIDENT Apparatus are exclusive of any applicable sales, use or excise taxes or other charges levied by any governmental authority shall be separately itemized on TRIDENT's invoice and paid by BUYER unless BUYER furnished TRIDENT a properly completed exemption certificate or such other evidence presecribed by the appropriate taxing authority as proof of exemption from such taxes.

11. TITLE/RISK

ALL TRIDENT Apparatus shall be shipped F.O.B. TRIDENT'S shipping dock, freight collect. Title shall pass to BUYER at the F.O.B. point which will be TRIDENT's shipping dock. Not withstanding the foregoing, until title passes to BUYER, TRIDENT agrees to maintain TRIDENT Apparatus in good operating condition. BUYER assumes all risk of loss or damage while the equipment is in the BUYER's possession, including without limitation, risk of loss in

transit from TRIDENT's facilities. TRIDENT may request, and BUYER shall provide TRIDENT with evidence of appropriate insurance coverage.

12. EFFECTIVE DATE, TERMINATION AND RESCHEDULING/CANCELLATION

The "Effective Date" of this agreement shall be the date indicated on page 1. This Agreement may be terminated by either Party at any time if the other Party has substantially breached any material province contained in this Agreement and this breach has not been cured within thirty (30) days of receipt of written notice thereof.

BUYER may reschedule or cancel, in whole or party, any order issued hereunder and accepted by TRIDENT at any time prior to shipment provided that written notice is received by TRIDENT. In the event of such rescheduling or cancellation, BUYER agrees to pay an amount equal to the appropriate level noted in the table provided TRIDENT has no other acceptable option for the rescheduled or canceled TRIDENT Apparatus within a reasonable period of time. An order can be rescheduled no more than twice for a cumulative period not to exceed ninety (90) days.

Number of Days Prior to Scheduled Shipment that Notice is Received by TRIDENT	Reschedule Charts	Cancellation Charts
130 and over	0	0
120-179	0	10%
90-119	0	20%
5-89	5%	40%
0-4	5%	60%

13. POST-ORDER INSPECTION AND ACCEPTANCE

BUYER may conduct, at its own expense, incoming acceptance tests to confirm that each TRIDENT Apparatus passes an acceptance test for such Apparatus as set forth in TRIDENT's Technical Specifications

Acceptance testing of the TRIDENT Apparatus shall be completed prior to any modifications and/or reconfigurance of the same BUYER. It shall be BUYER's responsibility to assure that TRIDENT Apparatus is fit for BUYER's particular purpose and meets BUYER's particular needs and expectations and that charges made to TRIDENT Apparatus do not effect the Apparatus, performance to specification. The period for conducting such tests shall conclude thirty (30) days after receipt of each TRIDENT Apparatus, or after 100 equipment operational hours (the "Acceptance Period"), whichever occurs first, and all TRIDENT Apparatus shall be deemed accepted unless written notice of acceptance test failure is provided to TRIDENT within the Acceptance Period. Payment shall not be construed as acceptance.

14. OEM CERTIFICATION

BUYER represents that the TRIDENT Apparatus purchased hereunder will be utilized by BUYER only in the assembly, and as a constituent part, of a Licensed Product assembled by BUYER and supplied for sale or lease to third parties in the regular course of BUYER's business. This representation is made for the purpose of enabling TRIDENT to determine prices applicable to this Agreement.

15. RETURNS

TRIDENT Apparatus sold to BUYER under the terms of this Agreement should not be returned for any reason without authorization and packing instructions.

16. TRAINING AND TECHNICAL SUPPORT

Technical Support from TRIDENT to BUYER may be charged at the then prevailing hourly rate. All costs of the support personnel's travel and living expenses during the first two (2) days and thereafter shall be charged to BUYER. The current hourly rate

is $110.00 per hour and/or $750.00 per day and the increase, if any, to a prevailing rate at the time BUYER requests Technical Support will be consistent with TRIDENT's actual cost for providing such services and with industry practice.

17. ASSIGNMENT

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Either party may assign this Agreement without prior approval to any of its affiliates, but otherwise neither party may assign this Agreement or any obligation hereunder without the express written consent of the other party, which consent shall not be unreasonably withheld; any such assignment to which written consent is not given shall be void, except as assignment pursuant to consolidation, merger, or in connection with the transfer of all or substantially all of its assets or business relating to ink jet printing/document processing devices, in which event the consent of the other party shall not be required.

18. INCORPORATION

Any clause required to be included by TRIDENT or BUYER in a contract or agreement of this type by any applicable law or administrative regulation having the effect of law shall be deemed to be incorporated herein.

19. SUPPLY ASSURANCE

TRIDENT will supply and BUYER will purchase ink jet printing devices and all of the BUYER's requirements for ink, ink supply systems (and special integrated circuits of the type used by TRIDENT (or) ink jet printer driver boards and all parts therefore so as to assure availability and the proper operation of the ink jet devices for a period of five (5) years from the date

hereof. However, TRIDENT's obligations to supply is conditioned on at least 50 ink jet printing devices per year with no more than two orders to reach such a quantity, that 1) TRIDENT has not been declared bankrupt, insolvent nor engaged in proceedings under the bankruptcy laws, or 2) TRIDENT is unable to produce product because of a natural or acidental disaster, war or other national emergency.

20. OTHER DEFINITIONS;

"LICENSED PRODUCT" shall mean the equipment made, used or sold by BUYER described in the LICENSE GRANT/APPLICATIONS/FIELD OF USE on page one, for use in applications described therein, employing and including ink jet printing devices supplied by TRIDENT when used in combination with ink and ink supply systems supplied by TRIDENT.

"PATENT RIGHTS" shall mean all United States and foreign patents and patent applications owned or controlled by TRIDENT or assigned by BUYER to TRIDENT or licensed by TRIDENT with rights to grant sublicenses, and all divisions, continuations, continuances-in-part, and reissues or extensions thereof, now or hereafter obtained to the extent, and only to the extent, that they or the claims thereof cover one or more features of Licensed Product and excluding patents, patent applications and claims thereof that cover items purchased hereunder including supplies and consumables.

"TRIDENT'S TECHNICAL INFORMATION" shall mean design, use, operating and assembly information and know-how (written or otherwise) relating to Licensed Product, including changes, enhancements, and improvements relating thereto, whether copyrighted or not with TRIDENT possesses during the term of this Agreement, insofar as necessary or useful

to Buyer in manufacture, use, test, installation, maintenance, or operation of Licensed Products.

"*CONFIDENTIAL TECHNICAL INFORMATION*" shall mean any and all of TRIDENT's Technical Information disclosed, directly or indirectly, to BUYER by TRIDENT or its Affiliates, heretofore or hereafter under this Agreement, or assigned by BUYER to TRIDENT, which information shall be marked or indicated "Confidential," except.

(a) Techincal information which at the time of its disclosure was in the public domain;

(b) technical information which after disclosure became part of the public domain by publication or it is published or otherwise through no fault of BUYER or its Affiliates (but only after and only to the extent that it is published or otherwise becomes part of the public domain);

(c) technical information which BUYER can show was in its possession or its Affiliate's possession at the time of disclosure and was not acquired, directly or indirectly, from TRIDENT or its Affiliates or from a third party under an obligation of confidence; and

(d) technical information which BUYER can show was received by it or its Affiliate after the time of disclosure from a third party who did not require BUYER or its Affiliate as the case may be, to hold it in confidence and who did not acquire it, directly or indirectly, from the disclosing party or its Affiliates under an obligation of confidence.

"*AFFILIATE*" as used in this Agreement in connection with a designated company shall mean any company of which the designated company now or

hereafter owns or controls, dirctly or indirectly, fifty percent (50%) or more of the stock having the right to vote for directors thereof. For the purpose of this definition, the stock owned or controlled by a particular company shall be deemed to include all stock owned or controlled, directly or indirectly; by any other company of which the particular company owns or controls, directly or indirectly, fifty percent (50) or more of the stock having the right to vote for directors thereof.

"*TECHNICAL SUPPORT*" shall mean TRIDENT's providng limited technical assistance to BUYER for the purpsoe of educating BUYER in the use, operation and assembly of Licensed Product.

"*TRIDENT APPARATUS*" shall mean any one or a combination of the "ink jet printing devices," "ink", "Ink supply systems," "ink jet printer driver boards," parts therefore including "special integrated circuits" and TRIDENT Consumablel Supplies' manufactures and/or sold by TRIDENT as the date of this Agreement.

"*TRIDENT CONSUMABLE SUPPLIES*" shall mean one or a combination of the "ink," "containers for ink," "wipe cards," "cleaning materials," "maintenance materials" and other consumables manufactured and/or sold by TRIDENT as the date of this Agreement.

"*TRIDENT's TECHNICAL SPECIFICATIONS*" shall mean TRIDENT's Technical specifications for OEM Ink Jet Assembly in effect as of the date of this Agreement.

"*COMMERCIALLY AVAILABLE*" shall mean any products offered by TRIDENT that are available for general sale or all customers. These items are pub-

lished in Trident's standard OEM pricing catalog, including various inks, Imaging Sub-systems, electronics, spare parts and the like. This pricing catalog is revised from time to time to include new product offerings.

* * *

TRIDENT, INC.
1114 Federal Road
Brookfield. CT 06904
Tel.: (203) 740-9333
Fax: (203) 775-9660

July 9, 1993

Mr. Torkild Jenssen
MARKPOINT
S. Saterigatan 20
S-417 11 Goteborg
Sweden

Dear Mr. Jenssen:

Enclosed you will find two originals of our Sales and License Agreement ready for signature.

If these documents meet with Markpoint's approval, please have both signed and dated on page two and return them to the above address. I will then have Mr. Van Brimer sign on behalf of Trident and return one fully-executed copy to you.

If you have any questions, please feel free to contact me at my office (35-3162-70161).

Sincerely,

/s/ MICHAEL LAVERTY
Michael Laverty
European Sales Manager

ML/mb
Enc.

TRIDENT, INC.
1114 Federal Road
Brookfield, CT 06904
Tel.: (203) 740-9333
Fax: (203) 775-9660

April 5, 1993

Mr. Torkild Jenssen
MARKPOINT
S. Saterigatan 20
S-417 11 Goteborg
Sweden

Dear Mr. Jenssen:

Enclosed you will find a draft copy of our current Sales & License Agreement.

Please let me know if you have any questions.

Sincerely,

/S/ MICHAEL LAVERTY
Michael Laverty
European Sales Manager

ML/mb
Enc.

TRIDENT, INC.
1114 Federal Road
Brookfield, CT 06904
Tel.: (203) 740-9333
Fax: (203) 775-9660

February 5, 1993

Mr. Ova Anderson
MARKPOINT
S. Saterigatan 20
S-417 11 Gotebog
Sweden

TRIDENT STARTER KIT

Dear Mr. Anderson:

Thank you for your expression of interest in Trident's ink jet products. In order to provide you with an opportunity to evaluate these products, we would be happy to supply you with an Evaluation Starter Kit subject to the following understanding:

(1) Within 14 days of receipt of the signed Starter Kit Agreement, purchase order and fee, Trident will ship two Starter Kits including one (1) Ultrajet™ HiDef™ compatible 96/32 low profile LISS printhead 36" tube length, PC BUS Driver Board kit and one (1) Ultrajet Jetwrite™ compatible 32/32 low profile LISS printhead, 36" tube length, STD bus Driver Board kit.

(2) The fee for the provision of these kits will be $5,394.00. This fee does not provide for two (2) man days of technical assistance and training at Trident's Brookfield, Connecticut facility, normally provided to Start Kit customers. Should you wish to avail yourself of this training at a later stage, it will be provided for a fee of $1,000.00 (not including any travel, lodgings, meals or other living expenses).

(3) You will maintain in confidence all Trident technical information you receive which has been designated as confidential by Trident, serve to the extent that the same falls into the public domain other than through the action of MARKPOINT.

(4) The Starter Kit components are to be used for internal and field test purposes only.

(5) The Starter Kit will be backed by Trident's standard test performance warranty; but no warranty is made or implied as to the suitability to your specific application.

If the foregoing is acceptable to you, please execute and return one original. The other original is for your files.

Very truly yours,

/S/ R. H. VAN BRIMER
R.H. Van Brimer
President and CEO

Date: 2/5/03
RHVB/mb

Company name

MARKPOINT DEVELOPMENT AB

By: */S/ OVA ANDERSON*

Ova Anderson
(Print Name)

(Title)

Date: 9/2-93

FEBRUARY 9/1993

Mr. R. Hugh Van Brimer
TRIDENT INC.
1114 Federal Road
Brookfield, CT 06904
USA

Dear Mr. Van Brimer:

Enclosed you will find one signed Starter Kit Agreement in return.

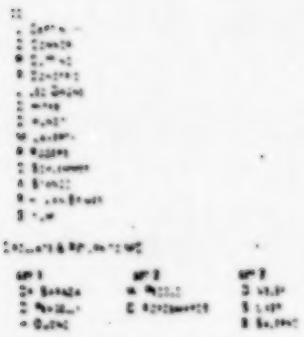
Sincerely,

/S/ OVE ANDERSON
Ove Anderson
Markpoint development AB.

EXHIBIT 4

FEBRUARY 13, 1997

MONTHLY MANAGEMENT REPORT
FOR JANUARY 1997



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TRIDENT, INC.

CONFIDENTIAL

EXHIBIT 4
PAGE 40

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CONFIDENTIAL

Technology Barriers to Entry

Barriers to entry of a competitor into Trident's markets are considerable. Our technology required an initial investment of approximately $20m and at least $10m of on-going R&D and process development. This work resulted in an extensive portfolio of patents and confidential knowhow. All of the impulse ink jet printheads on the market today required similar or higher investments.

The piston type transducer opposite an orifice is a fundamental patent. The advantage of this configuration is that it can provide large volume displacements and high frequency drop generation. It also separates the ink from the piezo material. The draw-back is that channel density is relatively low, although with a similar geometry, Epson has successfully miniaturized the components. Reducing the size also reduces the performance. Additional knowhow and patents relate to static and dynamic flow through the manifold, restrictor and chamber to optimize throughput and pressure oscillations and to minimize crosstalk.

The multi-orifice patent is also fundamental and it enables taller images and higher throughput. Knowhow relates to orifice profiles and spacing limitations, surface finish and manufacturing techniques and qualified suppliers.

The drive waveform is proprietary. A patent on sub-pulsing is important to allow non-porous inks to be jetted. This patent describes the application of a sub-ejection level voltage to the piezo crystal high enough to move the meniscus but low enough not to eject a drop. This stops a film from forming over the orifice.

Variable grey levels using multiple drops that merge in flight or at the same point on the substrate is patented. This will be

an important patent for Wide Area printing, but we do not use it today.

Trident possesses a considerable amount of knowhow in the processes used to build a printhead, including chamber plate to orifice plate bonding, attaching and then porting the pistons onto the piezo crystal, preparing the surfaces to wet/not wet as required and various methods of testing.

Ink the ink area, in addition to patents which provide some protection to all of the main inks, the optimization of the ink to the printhead requires intimate knowledge of the printhead operation and performance limits. Chemistries primarily include die and resin technology. Trident employs a staff of ink chemists and works with ouside developers. All of the formulations used today are owned by Trident and Trident is capable of their manufacture if required. Development work with a number of outside ink manufacturers is only performed after they agree only to supply the ink the [sic] Trident, not to competitors or end users.

Exhibit 5

Investment Highlights

- Dominant market position focused on industrial applications
- Proprietary technology protected by over 40 patents
- Increased adoption of automated identification systems
- Projected market growth of 40% plus in target carton coding niche
- 37% historical operating margins
- Substantial growth opportunities from new products and markets

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NOT FOR DISTRIBUTION

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EXHIBIT 5
PAGE 42
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Exhibit 6

CONFIDENTIAL

Trident International, Inc.
1998 Marketing Plan

TRIDENT
INTERNATIONAL, INC.

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EXHIBIT 7

Trident International
1998 Marketing Plan

1.1 Market Overview

The industrial ink jet printing market is large and growing. Including sales of CIJ, valve jet and impulse jet systems and consumables, global sales were $1.06 billion during 1996. Sales are projected to grow to $1.65 billion in the year 2001 (Source: GIGA). Carton coding is expected to be the dominant growth driver.

Trident dominates the impulse ink jet printhead market and plans to grow aggressively through the year 2000 and beyond.

Trident Sales by Geographic Area ($ million)

	1996	1997	1998	1999	2000	2001
Total	25.9	30.1	36.6	51.0	64.5	73.7
North America	18.0	21.7	24.0	36.1	47.6	54.1
Europe	6.0	5.8	9.3	10.4	11.9	14.1
Far East	1.9	2.5	3.3	4.5	5.0	5.5

Sales of Trident Ink Jet Systems and Consumables ($ million)

	1996	1997	1998	1999	2000	2001
Total	25.9	30.1	36.6	51.0	64.4	73.7
Imaging Subsystems	15.8	17.7	21.2	33.9	47.0	55.4
Consumables	8.2	10.9	14.0	15.7	16.8	17.6
Other	1.9	1.5	1.4	1.3	0.6	0.7

Challenges for Trident
Trident faces several major challenges including the emergence of less expensive inks and less expensive impulse ink jet print heads.

In order to achieve growth objectives, Trident must capitalize on all of its strengths, continue leading edge product development and broaden its business to new markets and new applications.

CONI
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TRIDENT, INC.

Presentation to the

Board of Directors

October 25, 1995

Brean Murray, Foster Securities Inc.
633 Third Avenue, 11th Floor
New York, NY 10017
(212) 476-0700

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MARKET POSITIONING OF TRIDENT

Company's Positioning

- *Trident is significant beneficiary of growth in industrial printing and marking*

  On-demand printing of carton and boxes is Trident's largest market segment, representing almost two-thirds of its sales. New printheads and inks under development will allow Trident to exploit product marking opportunity.

- *Trident is the leader in piezo-electric ink jet*

  Trident is the technology leader in an increasingly important segment of the overall ink jet market, with a dominant market share and a broad patent portfolio. The value-added component of Trident's technology generates a high gross margin (>60%).

- *Piezo has advantages relative to other ink jet technologies*

  Piezo utilizes an extremely simple mechanism, with virtually no moving parts. This makes it a less expensive, more durable, and flexible device, and thus suitable for industrial applications.

- *As OEM supplier, Trident has extremely efficient marketing and administrative operation*

  Lean overhead structure allows for low operating expense ratio, producing an EBITDA margin in excess of 40%.

- *The Company derives substantial portion of its revenues from sale of consumables.*

  Trident's marketing focus is on customers with heavy ink usage. This generates an annuity from the sale of inks, which accounts for approximately one-third of total sales.

- *Management has significant experience in ink jet field*

  Hugh Van Brimer holds 14 patents in ink jet field and related technologies. Elaine Pullen has held senior marketing and technical positions at several ink jet companies prior to joining Trident.

Exhibit 8

Technology
Technology—Misc.
Prudential Securities

Trident International

Company Report

Rating: BUY
TRDT @2 1/2—OTC

B. Alex Henderson (212) 778-1527
Lissa Bogaty (212) 778-5252
Yang Lie (212) 778-1724

May 24, 1996

	Earnings Per Share Fiscal Year Ending			P/E	Incr. Ca.	Yield	Shares O/S	52-Week Range
	9/95*	9/96E*	9/97E	9/97E				
New	$0.51	$0.83	$1.04	21.6X	—	—	7.2	33-17
Old								

DJIA: 5778.00
S&P 400: 806.72

* Pro forma for the initial public offering. Priced as of the close, May 22, 1996.

Buy Trident, The Technology Leader In The Ink Jet Market

- **Impulse Ink Jet Market Growing 40%—Trident Dominates.** Trident is the technology and market leader in the emerging impulse ink jet market, particularly in industrial applications such as carton coding. The company's core ink jet technology provides superior price/performance as well as flexibility and durability compared with other ink jet printing technologies or alternative printing modalities. Trident dominates this niche, and the technologies of Canon and Hewlett-Packard are not applicable to Trident's industrial arena. The speed, flexibility, image quality, and low cost of impulse ink jet is driving the displacement of continuous flow ink jet, valve jet, pressure-sensitive labels, and preprinted cartons, resulting in 35%-50% growth for impulse ink jet over the next 3-5 years.

- **Strong 30%-Plus Sustainable Revenue Growth With Stable 38%-42% Operating Margins.** Since 1991, Trident's revenues have almost tripled to $17.3 million in FY95. We expect a 50% jump in FY96, and while we are conservatively opening growth to vicinity of 30% in FY97 and FY98, we firmly believe this leaves plenty of upside for positive surprises given the 40% annual growth we expect in the emerging impulse ink jet market. Gross margins of 60%-plus and operating margins in the 38%-42% vicinity, depending on the mix of printheads and consumables should remain stable over time. We forecast earnings pro forma for the equity offering to increase from $0.51 per share in FY95 to $0.83 in FY96, a 66% increase. In FY97 and FY98, we expect $1.04 and $1.30, a 25% annual increase, leaving us much as 10%-20% upside annually for positive surprises.

- **Targeting $28 Over 12-18 Months, A 24% Upside.** At 21.6 times FY97 estimates, we consider TRDT to be undervalued. We are setting a target of 26-27 times forward earning 18 months out. This yields a 12-18-month target of $28, a 24% upside.

SMALL RECOVERY CAP

Exhibit 9

William L. Potter (212) 237-2234
Patrick J. Parr (212) 237-2319
Alex. Brown

June 3, 19

TRIDENT INTERNATIONAL, INC./NASDAQ (TRDT):
Demand Strong But Selling Cycle Extended; Slight Reduction in FY1997E EPS -- "Strong Buy"

Price 6/3	52-Wk Price Range	EPS (FY: Sep.) 1996A*	1997E	1998E	Cal. Yr. P/E 1997E	1998E	Indicated Div.	Yld.
20 1/2	15-25	$0.84	$1.10	$1.40	17.7x	13.9x	$0.00	Nil

FY Sep.:	1996*	1997E	1998E	C1996*	C1997	C1998
1Q	$0.18	$0.24A	$0.30	$0.20	$0.27	$0.3
2Q	0.26	0.27A	0.33	0.22	0.28	0.3
3Q	0.22	0.28	0.37	0.24	0.31	0.4
4Q	0.24	0.31	0.40	0.24	0.30	0.3
Fiscal Year	$0.84	$1.10	$1.40	$0.90	$1.16	$1.47

* *Pro forma for the IPO of 3.5 million shares on 2/27/96*

INVESTMENT HIGHLIGHTS

- Based on conversations with Trident management and with a sampling of its OEM customers, we are reducing our our F1997 estimate from $1.12 to $1.10, and our CY 1997E EPS from $1.18 to $1.16. In doing so, we are now in line with consensus estimates.

- The reason for the slight revision is that we believe the selling cycle for Trident's OEM customers is increasing as more OEMs are effectively competing for some of the same business. The implication is that OEMs might experience some delays in expected orders over the next two quarters as customers choose between multiple Trident-based proposals; nonetheless, overall demand remains strong.

- Our FY 1998E and our CY1998E EPS are unchanged at $1.40 and $1.47 respectively. We are encouraged by increasing participation by OEMs. Trident is gaining share with OEMs and end users, which supports our thesis.

Trident is rated "strong buy" with a twelve month price target of $35 reflecting a 24x multiple on CY 1998E EPS of $1.47.

comparison to label printers. Trident is benefiting from a replacement cycle from labels to direct carton coding.

4) A Proprietary Solution -- Only Trident supplies the (patented) ink jet sub systems that provide the high resolution for readability of barcodes required by Walmart and other retailers. As two VARs put it, 'Trident is the only game in town for both ink jets and ink.'

5) Growing Razor Blade Sales -- Ink sales were 35% of total revenues in 3Q:97, up 49% year-over-year. Trident's newest products consume more ink than the older products. And Trident is the sole source for the proprietary inks that are compatible with their ink jets.

VALUATION/CONCLUSION

We rate Trident shares 'strong buy' with a 25% long term growth rate and a 12 month price target of $35 reflecting a 24x multiple on CY 1998E EPS of $1.47.

Additional Information Available Upon Request

Alex. Brown & Sons, Incorporated maintains a net primary market in the common stock of Trident International.

Alex. Brown was an underwriter for the February 1996 offering of 3.5 million shares of common stock of Trident International.

Exhibit 10

MARKETING PLAN

1992-93

TRIDENT, INC.

Rev. Date May 20, 1992

I. INTRODUCTION/SUMMARY

SITUATION ANALYSIS:

At the mid point in the FY 1991-92, Trident finds itself behind its target goals for the year. Both internal and external factors have led to this shortfall.

The following external factors can be cited. Cooperative efforts with our largest customer have resulted in greatly improved quality product. Unfortunately, as a result of this improvement, this account has readjusted its purchase requirements to about one half of those originally anticipated. Also, the Persian Gulf economic slowdown has caused several of our other major accounts to readjust their forecasts. This sudden and dramatic decrease has left Trident with a void that will be hard to fill in the short term.

Internally, Trident has been delayed in the introduction of new products which were included in the current business plan. The [illegible] ink has delayed the full penetration of several market segments, primarily postal addressing. Although we are behind plan for this year, Trident has been profitable every month and is positioned to grow financially. Despite lower than planned revenues, Trident expects to grow at least 15% this year.

A number of new product introductions during the final half of 1991-92 will help adjust for the shortfalls noted above. [illegible] is now ready for full introduction. The anticipated release of a [illegible] for postal coding and a Non-Porous ink for product marking will also greatly increase the present limited scope of applications for the Trident Imaging Subsystem. Colored Ink and the availability to a complete imaging system are also under consideration.

Despite the recent shortfalls, Trident is [illegible] than it was one year ago. The most important changes has been the strengthening of relationships with key customers and the implementation of a stronger professional team. With the addition of new OEMs, Trident is no longer highly dependent on one account. Our customer list has grown to 20 active OEMs, up from 3 two years ago. In addition, 12 Starter/Evaluation Kits have been purchased by new potential customers since October of 1991. The Trident[4] and Ultrajet [illegible] are now in [illegible] worldwide due to expanded sales efforts in Europe and the Far East. Lastly, the [illegible] has improved dramatically along with expanded production output.

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ATTORNEY'S EYES

COMPETITIVE SITUATION:

Fortunately at this juncture, no viable technology that offers the same capabilities as Trident's Imaging Subsystem are available for industrial applications. Trident has recently become aware of several companies with technologies that could be viable threats in the future. We estimate these to be several years behind Trident in development. Simply stated, "for the buck", no other non-contact imaging system can produce the same print quality at high speeds and provide the simplicity and ease of use. There are several ink jet technologies that compete with Trident on a less than head to head basis. Trident continues to face an entrenched and solidly installed base from these competitors. For example: Videojet, Imaje, Domino, Marsh, and Kodak.

We have also been made aware of our first competitor in the ink business. A small company, ERT Ribbon, has contacted Trident customers seeking to sell a knock off ink that they claim can be used in a Trident system. Trident is prepared to use legal means to support the patents surrounding our inks. Most of our licensing agreements also help keep customers committed to using Trident consumable products.

Nevertheless, the single largest long term threat to Trident's business plan is the introduction of a heretofore unknown imaging technology offering a superior set of attributes. Through literature searches, conference attendance, and word of mouth, Trident will keep appraised of developments of potential competing technologies. As Trident matures its manufacturing capability, the experience curve will provide reduced costs which could allow Trident to compete with a newly introduced technology or competitor. Trident will monitor the progress and marketing directions of On Target Technology (OTT), Spectra, XAAR and Kodak's Ektajet line.

Quite often Trident competes against other technologies for imaging applications. The following is a condensed competitive analysis.

Characteristic	Trident	CU	DOD (Valve)	Bubble	Thermal	Other Impulse
Speed	High	Equal	Less	Less	Much Less	Somewhat less
Image Quality	High	Less	Less	Equal	Much Better	Better
Cost	Low	Very Hi	Equal	Much Less	Higher	Much Higher
Image Area	1"	Less	More	Less	More	Various
Substrates	Porous	All	Porous	Porous	Dedicated	All
Consumable Cost	Very Low	Low	Low	High	Very High	Equal
Head Size	Small	Large	Equal	Smaller	Large	Larger
Print Distance	Short	Long	Long	Shorter	Contact	Shorter

Exhibit 11

TRIDENT INTERNATIONAL, INC.

INTER-OFFICE MEMORANDUM

DATE: January 22, 1999

TO: File

CC: Valerie Lapinski, Andrew Borg, Don Hicks, Bob Donofrio, Norman Norris

FROM: Elaine A. Pullen

SUBJECT: Visit Report: Videojet Systems Intl. January 21, 1999

CONFIDENTIAL

Present:

Craig Bauer	President & CEO, VSI
Tom Barnett	President, Marsh Co.
Paul Witt	Director, Global Accounts, VSI
Valerie Lapinski	President, Dynatec
Elaine Pullen	President & CEO, Trident

Purpose:

To discuss resolution of Marsh/Videojet's breach of contract due to use of Marsh manufactured non-Trident ink in Trident printheads.

Discussion:

Tom Barnett repeated that he is only selling Marsh ink in either new systems or to win back lost accounts. We know this to be untrue. A Marsh distributor and two other OEM customers have confirmed that Marsh's distributors are being provided with an incentive to convert the installed base of both Marsh and other Trident OEM's systems. Tom continues to allege that his action was necessary to maintain profitability and that Trident has failed to either prevent Graphic Controls from selling third party ink, or to offer Marsh an acceptable price concession on Trident ink. Tom claims that his action was determined only after negotiation failed. We also know this to be untrue as the ink development started at least three months before discussions on a new agreement commenced. Tom also reluctantly agreed that a price increase is planned for Trident ink in April. Valerie again stated that ITW has considerable legal resources as compared to Trident and that they have started a thorough legal review and will take appropriate action to stop Graphic Controls.

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ATTORNEY'S EYES ONLY

Valerie also stated again that ITW does not allow contracts to be breached and although our desire is to avoid a legal action, an injunction and damages are the likely outcome. ITW would also, if pressed, discontinue the supply of printheads to Videojet and Marsh.

Trident is agreeable to Marsh using a differentiated bottle but not to a non-Trident ink being used.

Valerie requested a sample bottle of Marsh ink and the ink formula to allow Trident to estimate the cost of producing them for Marsh. We also reminded Marsh that we have rights to the ink under the agreement, which appeared to take Tom by surprise. He has clearly not examined or interpreted the grant back properly and is under the impression that only patents are granted to Trident, not confidential or proprietary designs, which is wrong. Marsh agreed to send the bottle and formula ASAP. Trident agreed to prepare a proposal covering only the issues directly related to maximizing and protecting the ink business for both parties. Time frame to present a proposal is 2 weeks after we receive the ink.

I asked Tom how we should handle warranty claims for heads now that they may contain non-Trident ink. Tom believes that our warranty cover is minimal anyway except on new heads out of the box, and the three year CP/OP warranty. Marsh tests at incoming inspection with solvent, therefore they believe these heads should still be covered. I will check warranty claim history.

Videojet has successfully prevented Graphic Controls form copying their ink. Craig agreed to look up the nature of the settlement and provide the information to Valerie.

Finally, Videojet and Marsh were asked to stop selling their own ink while we negotiate an agreement. They agreed to discuss it and let us know their decision early next week.

Elaine

Exhibit 12

TRIDENT INTERNATIONAL, INC.

INTER-OFFICE MEMORANDUM

DATE: February 15, 1999

TO: File

CC: A. Borg, D. Hicks, V. Lapinski, R. Conoffio

FROM: Elaine Pullen

SUBJECT: Visit Report: Videojet Intl. Inc. February 12, 1999

Present:

Tom Barnett, President, Marsh
Paul Witt, Global Account. Director

Valerie Lapinski, President, Dynatec
Elaine Pullen, President, Trident

Purpose:

The meeting was requested by Tom in response to my letter of February 5 to Craig Bauer in which I demanded full disclosure and assignment of ink and bottle designs, and compliance with the ink purchase provision of the license agreement.

Discussion:

CONFIDENTIAL
ATTORNEY'S EYES ONLY

1. Grant-Back

Videojet's inside and external legal counsel has advised them that the grant-back does not apply to the ink. We disagree.

However, Videojet will provide full details of the formula and process to enable Trident to make or have made the AD1 ink.

Videojet did not dispute the bottle grant-back. They were asked for a copy of the patent application. It seems that the patent may not have been filed yet. Tom will check.

2. Ink

3

Trident agreed to supply Videojet/Marsh with both the AD1 ink and Trident ink. It may be packaged in either the Trident or Marsh bottles. Trident will have the bottle made themselves, or purchase it from Marsh, whichever is most cost effective. The bottle will be exclusive to Marsh. The ink will be sold to all customers, provided reasonable commercial terms can be agreed.

Prices for the ink were given. The attached package was given to Videojet/Marsh, covering underpaid invoices and pricing for printheads and ink.

Marsh did not object to AD1 pricing but are still unhappy with the Trident ink price of $85.45. Their 1997 price was $80.50.

Marsh have been running their heads at 65°C for the past year, which is the required temperature for AD1. V-300 will have reduced throughput at 65°C.

TRID 33012

Exhibit 13

Ink Pirate Analysis

July 1, 1999 0 Hits

Per 1/2 liter bottle
Black vs. Only

	OEM	Distrubutor	Enduser	Average	
	2X Mark-up	25% Mark-up			
Trident					
Low	$70	$140	$175	$200 -$ 210	
* High	$110	$220	$275		
Diagraph via Fox	$134	na	$175 - $210		« Don't make nearly as much as our other OEM's
Graphic Controls					
High			$189		Offering $250 refurb process
Med.			$180		« Knauss Foods Quote via Diagraph
Lowest			$140		« Reported by Marsh
Squidd			$89		« Refill our bottle at end-users * Save 60% off High Res* Mostly sell direct to End User
Independant Ink		$160	$189		Sourcing from Renewable Resources
Marsh AD-1					
High			$150		« Use to be competitive?
Low			$60		« Reported by Loyd?

CONFIDENTIAL

TRID 037894

EXHIBIT N
TO WYTSMA DECLARATION

I(WED) 10:05 PRICF .RHOUSECOOPE TEL:21? ? 7960 P.001

PRICEWATERHOUSECOOPERS

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No. of pages: 11 (incl. this page)

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EXHIBIT
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CONFIDENTIAL FOR ATTORNEYS EYES ONLY REV

TRIDENT INK BUSINESS
A
FACTUAL REPORT
TO AID IN
PREPARING THE DAMAGE MODEL
FOR
INDEPENDENT INK INC.

Prepared by
Ranganathan NK
Executive VP & C.O.O.
Independent Ink Inc.

TOPICS

1. Trident Business : Executive Summary
2. Independent Ink Inc. : Business Summary
3. Business Model of Independent Ink for Hi – Resolution Ink.
4. Trident Market Share
5. Trident Ink Pricing model .
6. Independent Ink Pricing model
7. General Mills (Yoplait) : A Case study.
8. Summary

TRIDENT BUSINESS: EXECUTIVE SUMMARY FROM III PERSPECTIVE

Trident Inc. (Currently a division of ITW) manufactures and offers peizoelectric impulse ink jet printheads to original equipment manufacturers who then incorporate Trident printheads in to devices to print directly on to Cartons , check transaction coding , addressing etc.

The largest application for Trident printhead is the Carton Coding, which involves directly printing on to shipping cartons.

As is noted in their prospectus, a reduction in demand for carton coding systems would have a material adverse effect on Trident's business. This shows that the major business of Trident is for the Carton Coding industry.

The MAJOR REVENUE AND PROFIT STREAM for Trident is the sale of Ink in to the carton coding industry. As detailed in their prospectus, in Fiscal 1995 67% of Trident net sales came from Carton Coding. As per their prospectus, the market for Carton Coding systems will grow from $25 million in 1994 to $140 million in 1999 based on end use prices.

Trident through its Licensing agreement and a Single use License stamp on the bottle is trying to. keep the ink market closed to alternate ink suppliers like Independent Ink Inc.

Another Strategy of Trident was to sue company's like Independent Ink Inc. for infringement of their ink patent and violation of their single use license. Independent Ink Inc. has since prevailed in the Ink patent infringement law suit and is currently in litigation with Trident on the Single use license and the infringement of the 226' patent.

Trident sells their printheads to OEM's, who then construct Carton coding equipment to print directly on to Cartons. Trident sales for Carton Coding come from approximately 10 OEM's. All OEM's , customer of OEM's and end users are bound by the licensing agreement that prevents them from sourcing their ink from anyone else:

Trident by virtue of its licensing arrangement with its 10 OEM's pretty much controls the Hi-Resolution carton printing market. There have been other players in the market with other technology (such as hot wax) for direct printing such as Spectra but they have not been able to get even a minute market share from Trident.

It is a fact that Trident owns more than 95% of the NICHE market for direct Hi-Resolution printing on shipping cartons by

1. Their Patents on printheads and ink delivery systems.
2. Licensing agreement with top 10 OEM'S.
3. Their Single use license and "Do not refill" stamped on the bottle.
4. Suing Alternate ink companies on patent infringement.
5. Threats to OEM's to stop cuppiies of printheads if they source ink elsewhere.
6. Threats of possible law suits to end users to prevent them from refilling their bottles.

All the above issues have created serious barriers or entry in to the ink market for alternate ink manufacturers like Independent Ink , thus allowing Trident to enjoy unrestricted Monopoly.

Feb 26th 2001

INDEPENDENT INK INC. — BUSINESS SUMMARY

Independent Ink inc. was started in 1939 as a ink company offering Ink products for a variety of Industrial applications. Around 1980 Independent Ink Inc., got in to the Industrial Ink Jet business by offering alternate inks and make - ups and service to

1. D.O.D or the Valve Jet printers used for printing Large Dot Matrix text with very low resolution printing on to Cases and trays.
2. CU or continuous ink jet printers used for printing Small dot matrix text directly on to product packaging for date coding such as best before dates etc...
3. Hi-Resolution inks for Peizoelectric impulse ink jet printheads (TRIDENT) for Hi-Resolution Bar-Codes and text printing directly on to the shipping cartons. (early 1990's)

Independent Ink Inc. also offers a host of other alternate ink products and services to the Wide format Ink Jet market, consumer or desk top ink jet market , Textile pinting etc.

Independent Ink had been offering the DOD and the CU inks and make - ups for the industrial Ink Jet market since 1980. Some of the major OEM's in the industry for the CU and DOD business are

CU	D.O.D.
Videojet (MARCONI)	Marsh (which is currently
Domino	owned by Videojet or Marconi)
Imaje	Domino
Willet	Image (Buys from Marsh)
Linx	Willet

Weidenbach	Linx
	Diagraph
	Mathews

Independent Ink currently supplies alternate inks and Make - ups to end user and distributors using or selling the above equipment. Independent Ink offers high Quality, 100% compatible inks and make - ups for most printers at a low price (approximately 30% lower than OEM price).

HI-RESOLUTION INK BUSINESS

Since the users of CU and DOD machines also used Hi - resolution Trident printheads for printing on cartons it was but a natural product expansion for Independent Ink Inc., to offer Hi - Resolution ink to the discerning users who were complaining of exorbitant ink prices from Trident OEM's. The sales of Hi - resolution ink is extremely profitable and offers very high margins to Independent ink and significant cost savings to the end user.

Independent Ink started to offer alternative Hi - Resolution ink for Trident printheads used in the Check cancellation application in 1991. The distributor of Independent Ink was threatened with law suit by Trident attorneys, who then stopped buying from Independent Ink Inc.

Around 1996, Independeat Ink launched its Hi - Resolution ink far Carton Coding by offering a refill and return service. The customers send in the original Trident bottles and Independent Ink will clean and refill the bottles with its own ink and return the bottle to the user. Thus saving him costs and reducing environmental pollution. Trident sued Independent Ink for violation of its singic use license, 226 patent and infringement of their ink patent. Independent Ink pre-

vailed in the Ink infringement law suit but has suffered significantly in the refill business, as it had to fight Trident's law suit. Additionally, By their tying contract, Trident prevented Independent Ink from selling Bulk ink or ink in any other format to the OEM's and Distributors.

Feb 26th 2001

BUSINESS MODEL OF INDEPENDENT INK INC. FOR SALES OF HI-RESOLUTION INKS FOR TRIDENT PRINTHEADS

Independent Ink target market for the sale of Hi - resolution ink for Trident printheads used for printing directly on to shipping cartons are the end users, distributors and OEMs' and also a network of Independent representatives, packaging supply companies and service organization.

In a ideal situation, If there was no single use license, Independent Ink would have set up refill centers all over the United states with Independent reps and offered them bulk ink for refilling customers original Trident container thus offering a significant cost reduction.

The selling points of Independent Ink for refill program and for Bulk ink or sale of Trident compatible Ink in any other format are

1. 100% compatible ink (free and clear of any patent infringements)
2. Lower price
3. Refill service
4. Environmental benefit.

The law suit has severely restricted our ability to sell the refill program, or Bulk ink or our ink packaged in any format to OEM's, distributors, independent reps or end users as they feel threatened by a possible law suit from Trident.

The Trident Hi - Resolution market is unique,

1. It is a niche market clearly defined by Hi - Resolurion direct printing on to shipping cartons.
2. The market is narrow and it is controlled by Trident.

3. There is a single use license restriction on the bottle thus limiting refilling.
4. There are contracts between OEM's and Trident which pass on to Distributors and Customers thus seriously limiting their ability to source ink elsewhere.
5. Threat of law suit.

Independent Ink has lost significant market opportunity due to the impending Trident law suit in the refill market, supply of bulk inks to OEM's and Distributors or sale of our ink in any format to the Distributors and OEM's due to their tying contracts that extend all the way from the OEM to the distributor to the end user.

Feb 26th 2001

TRIDENT MARKET SHARE

TRIDENT MAJOR OEM'S FOR HI-RES CARTON CODING MARKET

1. MARSH (Owned by Videojet Marconi Data Systems)
2. VIDEOJET
3. DIAGRAPH
4. FOXJET (Owned by ITW)
5. WILLET
6. ITI (owned by ITW)
7. MATHEWS

TRIDENT MAJOR OEM'S ESTIMATED MARKET SHARE FOR HI-RES CARTON CODING PER CAP VENTURE REPORT

OEM	MARKET SHARE (1999)
MARCONI DATA SYSTEMS (includes Marsh)	51%
FOX JET (div of ITW)	13%
DIAGRAPH	10%
ITI (div of ITW)	10%
MATHEWS	5%
WILLET	3%
OTHERS	7%
TOTAL TRIDENT OEM MARKET SHARE	99%

All Inks for the above systems are supplied by Trident due to their contracts and singel use license. Independent Ink at the most would have less that 2% of Trident market share due to the restrictions.

ESTIMATED TRIDENT PRICING MODEL

Trident sells their ink to OEM's and we believe that the estimated price to OEM's are

Year →	1994	2000
	$	$
Trident price to OEM	130	85
OEM Price to distributor	220	175
Distributor to End User	280-325	200-250

All prices indicated above are for 17oz filled bottles (approximately 1 pint)

INDEPENDENT INK PRICING MODEL FOR REFILLED BOTTLE OF HI-RESOLUTION INK

Component	Cost
Ink (17oz)	$9.15
Labor + Packaging etc	$1.20
G&A (20%)	$2.07
Total cost	$12.42
Average sale price for 17oz	$158.00
Refilled bottle	

GENERAL MILLS : AN ACTUAL CASE STUDY

THIS PLANT HAS SWITCHED 100% TO INDEPENDENT INK REFILL PROGRAM

Description	Quantity
Number of installed Trident printheads	7
Number of Cartons Coded per year	40 million
Number of Refill Ink bottles purchased for 12 month period 1/2000 to 12/2000	.434
Average price per refill bottle	$149
Total business Volume / year	$64,666
Cost of filling 434 bottles	*$5390*
Gross Margins	$59,276

THIS PLANT WAS PAYING $269 PER BOTTLE TO TRIDENT OEM BEFORE THEY SWITCHED TO INDEPENDENT INK INC.

THIS PLANT SAVED $52,080 PER YEAR WITH THE REFILL PROGRAM.

SUMMARY

Trident's contracts with their OEM's, Distributors and End users, coupled with their so called "Single Use License" has prevented Independent Ink from refilling and selling its Ink, which is free and clear of any patent infringements.

If Independent Ink had not been sued by Trident, Independent Ink would not have faced the constraints and would have successfully promoted and expanded its refill sevicc to all of Trident customers and sold ink to distributors and OEM's.

Independent Ink has the reach through its current customer base for other Industrial Ink products to sell ink to Trident users. Independent Ink would have been able to sell its ink to Trident OEM's and Distributors if there were no tying contracts and law suit.

Independent Ink prices offer great savings to the Trident users and also helps the environment through its refilling program, eliminating hundred's of thousand's of thousands of bottles from land fill. Independent Ink also offers the customer the choice to save huge amounts of money by offering a good quality product at a low price.

By virtue of this law suit with Trident, Independent Ink has lost a tremendous opportunity to capture a huge part of Trident's Ink business. This is well established by the General mills model for refill business. In addition, Independent Ink has lost the opportunity to sell to Disibutors arid OEMs' as well due to Trident's tying contracts.

In a nutshell Trident has through their contracts and single use license has prevented Independent Ink from selling ink in any format to its OEM's, Distributors and End users.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE NORA M. MANELLA,
JUDGE PRESIDING

INDEPENDENT INK, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CV98-6686-NM
	)	
ILLINOIS TOOL WORKS,	)	
	)	
Defendants.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
January 28, 2002

SHARON A. SEFFENS, RPR
United States Courthouse
Room 432-A
312 North Spring Street
Los Angeles, California 90012
(213) 625-7400

[Tr. 2] APPEARANCES OF COUNSEL

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For the Defendants and Counterclaimant:

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LOS ANGELES, CALIFORNIA; MONDAY, JANUARY 28, 2002;10:00 A.M.

THE CLERK: Item No. 6, CV-98-6686-NM, Independent ink versus Illinois Tool Works.

[Tr. 3] Counsel, please state your appearances.

MR. O'CONNOR: Good morning, Your Honor. Edward O'Connor on behalf of Independent Ink.

MR. SIGALE: Good morning, Your Honor; Jordan Sigale on behalf of defendant Trident and defendant and counterclaimant Illinois Tool Works.

THE COURT: Good morning.

We are here on motions for summary judgment filed by both parties. I think I will not go through a lengthy recitation of the facts. The parties have been before this Court before. Essentially the defendants manufactured a patented printhead, a cable printing bar codes on corrugated materials and kraft paper. Original equipment manufacturers or OEM's installed the printheads in printers, which are then sold to large product manufacturers who then use them to print bar codes on their cartons.

Both Trident and Independent manufacture ink that will function with the defendants' printhead system, and the defendants condition the sale of their patented printhead system on their consumers also purchasing defendants' ink, a tying arrangement.

I believe it's undisputed that before Trident began [Tr. 4] manufacturing their printheads there were labeling machines — and still are — that print bar coded labels and could and

can be used to affix codes to the end products, and I believe that the record is clear that after Trident developed its printhead system at least two other competitors, Markem and Xarr, developed a printhead that would print bar codes on corrugated materials and kraft paper.

Its plaintiffs allegation that defendants' tying arrangements violate Section 2 of the Sherman Act per se, that is, they are per se illegal tying arrangements, and it's plaintiffs argument that because defendants have a patent on their printhead system they have market power, which they then use improperly.

Plaintiff also alleges in the complaint that defendants have monopolized, attempted to monopolize, and conspired to monopolize the market for ink used in connection with their printhead system in violation of Section 2 of the Sherman Act.

There is also a Cartwright claim as well, but it's not treated independently.

Plaintiffs motion for summary judgment is premised on its claim that defendants' tying arrangements constitute per se violations of Section 1 of the Sherman Act. It is the defendants' position that a patent on the tying product standing alone with no consideration of the product at issue or [Tr. 5] its substitutes confers market power as a matter of law requiring neither a definition of the relevant market nor a demonstration of the defendants' power in that or share of that market.

It's the defendants' position that no Court has ever held that patent tying is not a per se violation of the antitrust laws.

Mr. O'Connor, when you argue, I guess I will have to ask you about at least three cases that I found that in fact belie that assertion? Obviously there is a host of authority starting with Justice O'Connor's often quoted concurrence in Jefferson Parish. That is simply not the case.

Plaintiff does make the argument that patent tying cases are different, but there are in fact patent tying cases in which the Courts have continued to insist that the plaintiff both demonstrate the relevant market and demonstrate market power within that defined market.

There is some case law suggesting a presumption of market power, but I have seen nothing to suggest that even if such market power were presumed it could be presumed in the absence of a defined relevant market, and defendants' essential argument is that plaintiff's failure to either identify or define this market much less demonstrate market power defeats plaintiffs motion for summary judgment.

With respect to defendants' motion for summary [Tr. 6] judgment, it's a little more complex because the defendants are moving on all causes of action, but essentially, defendants are arguing that the plaintiff cannot establish — has not defined the market, cannot establish that the defendants have market power in whatever that relevant defined market might be and that by relying solely on the per se argument that a patent in the tying product alone confers power, end of discussion. Plaintiffs have essentially raised no triable issue of fact.

Defendants go through the various ways in which plaintiff might have defined the market and note — I am not entirely sure Mr. O'Connor would dispute — although he may have a definition of "market," I don't think Mr. O'Connor would dispute that he has not attempted to show that market through any traditional economic analysis, whether it's a geographic market or a product market.

It's also the defense position that the plaintiff has not attempted nor can he show that the defendants possess a dominant market share in that as yet undefined relevant market, and certainly that defendants' own statements that may appear in internal memoranda or in advertising or in publicity are themselves of no probative value for purposes of the anti-

trust laws, and I think also probably the argument that even a statement of percentage is meaningless unless you have a market defined.

Finally, the defense also argues among the various [Tr. 7] burdens that plaintiff fails to meet that the plaintiff hasn't identified barriers to entry, although there is some evidence in the record that at one time Trident considered the barriers to entry in at least part of a market to be difficult.

Obviously they didn't stop Markem and Xarr from eventually entering the market, nor presumably would those barriers apply to anyone wishing to sell a labeling machine that performs the same function as a printhead system that prints bar coded labels.

As to the Section 2 analysis, it's really not there. The defendants have moved on Section 2. The plaintiff does not address it in its opposition, and for that reason, obviously we don't have the proffered evidence that the defendants suggest would be necessary to create a triable issue of fact on the monopolization claim.

Mr. O'Connor, I think I would like to hear from you first.

MR. O'CONNOR: First of all, with regard to the issues of the markets and what we are defining as the markets, to me it was very clear, but maybe it wasn't to the Court that there are two markets. There is the market in which the Trident patented technology competes, and I believe their own documents and deposition testimony indicates that in that market which they have defined as the market — they use the term "market" continually in their own papers and in their own internal [Tr. 8] documents, even in deposition testimony.

THE COURT: Right, but the Courts are pretty clear that that doesn't have much relevance for antitrust analysis.

MR. O'CONNOR: If I may, the other market is the market for ink which is specially manufactured for use in that

patented technology, and in that market, the sole universe of sales is the Trident products. If you recall, during the Markman hearing, Trident produced witnesses who testified at length that only specially formulated ink will work in their system and that specially formulated ink for their system won't work anywhere else.

So the issue here is whether Trident has been using its patents — and I don't think that's controverted — to extend its monopoly to prohibit or inhibit the ability of competitors to sell ink for use with its system.

THE COURT: Well, normally tying arrangements are focused on the consumer.

MR. O'CONNOR: Well, these are focused on the consumer because the consumer is directly impacted. Among the consumers are the OEM's. The OEM's have who entered into these tying agreements are consumers of ink. They purchased that ink for resale, and we submitted affidavits or declarations to that effect.

THE COURT: Do they do that up front? Is that part of their agreement for buying the printhead?

[Tr. 9] MR. O'CONNOR: From Trident?

THE COURT: Yes.

MR. O'CONNOR: Yes. It's in theft OEM agreement.

THE COURT: That's right. They know it from the outset.

MR. O'CONNOR: That's right. From that moment, you have an illegal extension of the patent monoply by telling people who are buying this equipment that if they are going to buy that equipment they are also going to only buy their nonpatented consumables from Trident. That's a classic tying arrangement.

THE COURT: I don't think the defense disputes that it's a tying arrangement. I think they dispute whether it's illegal. Not all tying arrangements are illegal.

MR. O'CONNOR: A patent arrangement —

THE COURT: It's your position that all patent tying arrangements are, although certainly Courts have held otherwise.

MR. O'CONNOR: Well, I didn't find any Courts that held that a patent tying arrangement vis-a-vis — the only cases that I found and I pointed that out, and I have read all of their cases — involve an argument that vis-a-vis competitors in the tying market — that having a patent doesn't necessarily confer market power.

In other words, if you have A, B, and C, and A is a [Tr. 10] competitor — it makes Trident-like equipment — B is Trident, and C is the consumables, the fact that B has a patent doesn't mean they have market power vis-a-vis A or of the competitors. That's just common sense, Just because I have a patent on something doesn't mean anyone is going to want to buy it.

Those cases uniformly involve an argument relating to competition directly between what we call the tying products. In this case, it would be like the razor blade analogy. The tying products are razor blades, and I have a patent on a particular razor. That doesn't give me market power vis-a-vis other razors. Nobody may want my razor. That's what those cases have uniformly held.

No case that I have ever found — and I don't think there are any cases — say that vis-a-vis the tying product, the razor blades — that having a patent doesn't per se confer market power vis-a-vis the razor blades.

THE COURT: I guess I am not quite — well, I will let you proceed.

MR. O'CONNOR: Well, no, I would like to hear your question. Hopefully. I made that point, but —

THE COURT: No, no, go ahead.

MR. O'CONNOR: In this situation, you have — and I have cited all the Supreme Court cases that say that. When Justice O'Connor made that statement, I don't think she was referring to per se patent tying, but the majority did make [Tr. 11] reference to per se patent tying —

THE COURT: But that wasn't a patent tying case.

MR. O'CONNOR: I know, so you could say that there was dicta on both cases, but the majority cited to cases that were patent tying cases where that in fact was the holding of the Supreme Court. Their only argument, as I understand it, is that the Patent Misuse Reform Act changed everything.

THE COURT: I don't think that's their only argument. I think they make that argument, and you say — I think their argument is basically the late Professor Areeda's argument, that it would be nonsensical to impose a greater burden on a defendant seeking to use it as a shield than it would be on a plaintiff seeking to use it as a sword. That view seems to be shared by many. I understand your argument that Congress could have been clearer had it wanted to be, and it chose not to be.

MR. O'CONNOR; Well, it's more than that. If you read Judge Jenson's opinion —

THE COURT: In the Squid case, yes, but Judge Jenson just cites to a practitioner's article with a quote in it. It's certainly not necessary to Judge Jenson's holding in the Squid case.

MR. O'CONNOR: Well, that was a defense that they raised, and he rejected it. He rejected that same defense, and he cited not to just the article but the article's citation to the legislative history. The legislative history of that was [Tr. 12]

that they — special interests have been trying to knock down this per se patent antitrust thing for years. This Patent Misuse Reform Act was an attempt to do that.

I handed to you the comments of Henry Hyde when he introduced the bill in 1995, and in that — in his opening remarks, he acknowledges that this is the law, that patent tying is the law, and he wants it changed, and I recall that —

THE COURT: I guess Congressman Hyde isn't the last word on what the law is.

MR. O'CONNOR: Well, no, but on the other hand, why is he trying to change the law if the law is as it is?

THE COURT: I understand your argument, and I think it's a perfectly legitimate argument. That's what he thought the law is, but at the end of the day — you know, Congress writes lots of laws that judges ultimately disagree on the meaning of.

MR. O'CONNOR: I understand.

THE COURT: But you are absolutely right. He clearly considered that it was something that needed to be changed.

MR. O'CONNOR: At that time, I was the committee chairman at the ABA, and we were debating that very same law, and all these issues were brought to the floor, and because of the concern I had voiced by other chairmen, the ABA did not endorse this Hyde bill because of the concern of the impact it would have on patent tying.

[Tr. 13] If I could just address Professor Areeda's arguments just because I think it's important to understand the distinction, which I believe he missed with all due respect to Professor Areeda. That is, they are basically mixing apples and oranges. The Patent Misuse Reform Act — and I deal with that constantly. The problem with that was there were abuses in it.

You could have a willful infringer Remember I told you about the A, B, and C. A is an infringer. He sees B over here. He has a product that's patented, and A wants to copy his product. He also knows that B has an Illegal tying arrangement, so A comes in and says I am not affected by the illegal tying arrangement. Those affect C that sells supplies, but I am going to take advantage of that and willfully infringe, and people were doing that.

So to eliminate that abuse, the patent laws were amended specifically dealing with patent infringement cases to make as a requirement to asserting that defense that you would first have to show that the infringer was impacted by the market power of the patentee. That has nothing to do with whether or not the patentee's agreements in tying up supplies for his product and impacting that market was legal.

Those are apples and oranges. They are completely different concerns. The Patent Bar was concerned with the first, which is where the amendment came into being. The [Tr. 14] antitrust bar was concerned with the second, and the antitrust advocates for less restrictive antitrust laws included language in that bill to eliminate the presumption of market power in a tying situation, and they were voted down, and they tried it again I think in '92. They were voted down. They tried it again in '95, and they were voted down, so they have never been able to get that door open.

What is going on now is Trident is saying, okay, actually the door was opened. If it was opened, why did they keep trying to open it? It wasn't open. The statutory language is very clear. There is nothing in that statute which says anything about the antitrust laws, so the last word on that regarding whether there is a presumption of patent tying are the Supreme Court cases that specifically say that a patent conclusively establishes market power, and that's why it is per se.

The fundamental policy reason behind that is that patents are of a limited duration. They are a monoply. They are frowned upon. This society does not like monopolies, but we grant a limited monopoly for a limited time limited to the claims. I fight that battle all the time. What do the claims mean? How broad is your monoply? We do that battle every day.

What happens when you have an illegal tying arrangement is now you have extended your patent monoply beyond your patented product into a nonpatented product, and you have [Tr. 15] done it by a contract, so you are using your market power within the patented product, that you have power in that product alone, the particular printheads, the type of razor, and now you are using that power to expand your monoply to give you an exclusive monoply on things that are not patented.

That's more than Salt. That's Lowes Pictures, a whole slew of cases, and they are all Supreme Court cases. They [sic] has never been a Supreme Court case which has reversed that, nor do I believe there has been a District Court case. There have been some copyright cases outside the Ninth Circuit where people have said, well, maybe that presumption shouldn't apply in a copyright situation. Maybe you should have to show market power or not but never in a patent case because that has been held to be not illegal patent tying that I know of.

THE COURT: You have looked at Schlafly, Chumenata (phonetic), the Western District of Pennsylvania case, Lampold (phonetic) v. Roberts?

MR. O'CONNOR: I have looked at all of those. I have read Chumenata probably 200 times for other reasons, but that's a case that I have almost memorized. None of those cases say that you can have a patent tying arrangement and that it does not violate the antitrust laws vis-a-vis the tied product. There is not a case that says that.

One case which dealt specifically with the Patent Misuse Reform Act was Judge Jenson, and Judge Jenson [Tr. 16] specifically said that the Lowes Pictures and all those lines of cases are alive and well and still in full force and effect.

THE COURT: Do you agree or disagree with Trident's position that the Federal Circuit certainly doesn't take that position?

MR. O'CONNOR: Absolutely not. I cited you the Federal Circuit case, and I quoted extensively from that case, which — was it Mallinckrodt? I believe it was Mallinckrodt where they cite specifically specifically [sic] about illegal tying arrangements violate the antitrust laws, and they distinguish that case — they said that a patent tying arrangement is already illegal was what their language indicates. That was a case that did not involve a patent tying arrangement. That had to do with a single-use restriction.

THE COURT: But then if you are going to go beyond that, certain you have got to deal with all of the cases — Northern Pacific and the Supreme Court saying it's common knowledge a patent does not alway confer market power —

MR. O'CONNOR: Your Honor, I just addressed all that. Those cases do not involve an antitrust violation related to the tied product. That has to do with whether just because I have a patent on a product doesn't give me market power vis-a-vis my competitors. That's what they are talking about. Otherwise, how could you reconcile these statements if you have the Supreme Court saying it's an absolute presumption of market [Tr. 17] power, and you have got other cases saying it doesn't mean a thing? They are talking about different situations.

THE COURT: You have to admit that in Jefferson Parish certainly the language was dicta because it wasn't a patent tying case. It was hospitals and anesthesiologists.

MR. O'CONNOR: Sure. Same with Justice O'Connor's remarks. They are dicta, but my point was in Jefferson Parish the Supreme Court didn't just pull that statement out of the air. They cited to the Supreme Court cases that had held that where that was not dicta. That just happened to be a more recent pronunciation by the Supreme Court, but the cases they cite were not dicta, and the other cases I cited were not dicta.

There has never been a Supreme Court case that says that for a tying tied product relationship that there is ever an issue as to whether there is market power in the tying product if the tying product is patted.

THE COURT: I am not sure I understand your nomenclature, that there is market power in the tying product. What we usually say is the tying product market. Once you talk about the tying product market, then you are talking about a market that has to be defined by the tying product and its substitutes and potential substitutes.

MR. O'CONNOR: I think if you read the tying cases they don't talk about a tying product market. They say there [Tr. 18] is a market in the tying product. The tying product defines a market. That's what a patent is all about. That's why they say that because it's unique. It's the specific unique characteristics, and that defines a market. Now we are talking about what do you sell to that market?

So in the patented razor that uses a specific kind of razor blade, it's not a market in which that razor competes. That razor is a market, and then the issue is, well, who can sell razor blades in that market because they are specially configured?

It's the same thing we have here. It's special ink. That ink has the market, and the market is the printheads. All the cases that talk about a tying product market are cases where the

issue is whether the patented product has market power vis-a-vis its competitors, not vis-a-vis the tied products.

If you just stand back and think about it, if you allow that, what you doing is you are allowing somebody to take a patent and then just expand that patent way beyond the claims of the patent. That's the policy that the Supreme Court has clearly enunciated is prohibited.

I challenge the other side to come up with a case — this would be a case of first impression. It would be overturning all the Supreme Court precedent saying it's a per se violation of the antitrust laws.

[Tr. 19] You have raised questions about what is market and market power. Hopefully I have addressed those as they relate to the others as well, but in terms of is there evidence of market power, there are many ways of showing market power, and those include putting economists on the witness stand. That's evidence.

Evidence is also admissions. A percentage of the market establishes market power. That's at least one of the fundamentals, and there are presumptions depending upon how high that percentage is. In this case, we have an admission they had 90 percent of the market. We —

THE COURT: I don't know what that quote meant frankly. I think you quoted a portion of a page. I am not even sure we had that deposition lodged.

If I say I sell 90 percent of Altoid mints in California, that doesn't tell us much, does it, for antitrust purposes?

MR. O'CONNOR: No, but in context, if you are saying we have developed a special kind of mint and we have a niche market for these mints because they give you energy or whatever, and we dominate the market for this specific type of mint, that's the relevant analogy, not just mints.

Again, we go back to what does a patent mean? They developed — and they brag about it and rightfully so — a very particular type of patented technology and for a specific use. [Tr. 20] Before Trident, there wasn't any direct printing on carton coding of these huge crates and things like that. You had to use labels, so they came up with a new technology. They patented that new technology. They have almost no competition in that technology. XArr got in. I think Xarr went out. Those came in a very limited basis. There were differences in their technology. It wasn't exactly the same, but they did do the direct printing.

In terms of market share, there was Trident, and then there were a couple of wanabees. That defines a market. In their documents, they repeatedly refer to the "market," "our market," the "Trident market." That particular technology is a niche market. It has particular characteristics. It's different from labels. It has advantages over labels. It has some disadvantages over labels, but it is its own specific type of technology, and a couple of other people were able to get in — well, in the first place, other people couldn't get into the technology defined by their patents.

THE COURT: That's obvious.

MR. O'CONNOR; My point is the people who did come in had to get around their patents, and as a result, their technology was greatly inferior, and they were never able to get a hand-hold on that market. Trident has basically owned that market, particularly at the time — the relevant time period here is when those OEM agreements were entered into.

[Tr. 21] That's the time period I was asking Ms. Pullen about, and she said they had about 90 percent of that market at that time, so they dominated it, and then the other documents, including end-year reports, talk about Trident dominates. We are in a position to dictate to our customers, which is a classic illustration of antitrust power.

That goes to all the counts where market power is relevant. If they have market power — at least there is certainly evidence — their own admissions — or at least nothing — at a minumum creates an evidentiary issue as to whether they had market power I think is conclusive because you have an admission of a party. If somebody admits to murder, it's not a defense to say, yes, but they didn't match up the ballistics. A confession is a confession. An admission is an admission. More to the point —

THE COURT: But if they said I the shot the gun, that's not an admission of murder —

MR. O'CONNOR: That's correct, but if they said I shot the gun and killed that guy, and here if they say we have market power and we dominate the market, that's the analogy. They did not introduce one scintilla of evidence that they didn't dominate this market. They have never said we didn't have 90 percent market share. They have never said we didn't basically own the market. They didn't say we didn't drive the market. There is nothing from them to counter their own [Tr. 22] internal statements. This record is bear of anything other than their own bragging basically that they dominate the market.

The two basic issues are what's the market, and its important to understand that there is a market in a patented product, and then there is a market in which the patented product competes.

O matter which way you look at it, Trident had market power. They had market power in their own technology by virtue of their patent, and — again, this is not a case where we are talking about nails that you could use in, you know, a patented nail gun. We are talking about a specific formulated ink. If you recall, they tried to — they brought a patent suit on our ink formulation, and their whole theory was only specially formulated ink will work in this technology.

They lost that patent suit. If they had won that patent suit, then they would have been in a proper position to say we could stop people from selling ink, but they lost that. They had no patent rights to keep Independent or anybody else from making the same type of Ink, and yet they are doing it because they used the power of their patents to force people — OEM's who wouldn't go to anybody else — the OEM's to prevent them from buying ink from Independent or anybody else, and that's a classic violation of the antitrust laws.

THE COURT: Thank you.

[Tr. 23] Mr. Sigale.

MR. SIGALE: Your Honor, it seems from Mr. O'Connor's comments that we are not as far apart as I once thought we were. I think there is agreement that the test in Jefferson Parish applies. I guess the question is how do you apply it?

This test has four parts. I won't run through it. I am sure the Court probably has it by memory by now. We focus on the third element, whether or not there is sufficient power in the tying product market. That is the current state of tying law under Section 1.

As I had previously understood Independent's argument, it was that there was a presumption where there is a patent that there was sufficient power in the tying product market. Now there seems to be some other definition that dates back to before the Fortner decisions of the Supreme Court, which I think everybody agrees changed the law on tying, which culminated then in the Jefferson Parish decision, whether or not there is sufficient power in the tying product market as Your Honor has already pointed out.

Then we get down to how do you define the market? Mr. O'Connor defined two markets. One I believe is the tying product market — and I want to focus on that — as the market in which the Trident printhead competes. I think we agree

on that. The tying product market is the market in which the Trident printhead competes. Unfortunately, that definition is [Tr. 24] circular. It begs the actual question. What does the Trident printhead compete with?

As Your Honor pointed out in your opening remarks, we compete with preprinted labels, We compete with labels on demand. Trident competes with Xarr and Markem. There is no evidence that Xarr and Markem have gone out of the marketplace, and until now, I had no inkling that they have. As a matter of fact, I don't believe they have gone out of the marketplace.

In fact, Trident competes with lots of things. There was even evidence in the record that people are still buying preprinted boxes. What it comes down to —

THE COURT: Well, I think one of the OEM's said — you may be referring to other evidence — but that he had to essentially persuade his purchasers to go to ink jet printing over labels which they preferred.

MR. SIGALE: Correct. There is certainly — I think what we raised was sufficient to show that they are not going to be able to prove a tying product market in which we have sufficient power, which is defined in Jefferson Parish's 30 percent of market.

Perhaps taking from your analogy on the Altoids, let's move to Mr. O'Connor's analogy on razor blades and razors. There are lots of patented razor stems out there. When I go to Target to go buy a razor, I look at how much the razor blades cost, and I make a decision whether or not I am willing to get [Tr. 25] into a new razor blade. If I don't like how much that new razor blade with the new fancy technology is going to cost me, I don't buy that new razor because I don't want to have to ultimately buy the razor blades.

I think that's what you are raising, and that's the issue of the OEM agreement. The OEM customers knew in advance

what this was going to be about. They understood that if they were going to get a license on the printhead technology that they were going to have to buy ink from Trident, and they agreed to that bargain.

There was no coercion. There were other technologies that they were in like Marsh as you pointed out. They chose to also get into the Trident technology. They still sell all of them to my knowledge, and Marsh is still selling print-and-apply label systems. They are still selling preprinted labels as well as the Trident system in competition with one another.

So when we look at that and try to figure out what a market definition could be, I think that has to be considered, and plaintiffs have presented no evidence on that point. They rely on this presumption, which I don't believe that they have supported here.

Mr. O'Connor when you asked whether or not there were cases in which Courts have held that there is no presumption you asked him about Schlafly. In fact, as this Court is [Tr. 26] obviously aware, Schlafly did in fact in a Section 1 tying case say there is no longer a presumption citing to the Federal Circuit's case in Abbott Labs versus Brennan.

In Abbott Labs versus Brennan, which Independent points out was a Section 2 case, the Federal Circuit looks at Justice O'Connor's opinion in Jefferson Parish and takes from that the point that patents do not in of themselves confer market power.

Your Honor had indicated there were cases that you wanted to ask me about.

THE COURT: No, not necessarily. I think I raised them with Mr. O'Connor. I think I understand your definition of the relevant market and the definition of — well, what the relevant market is and how you demonstrate market power, but Mr. O'Connor is making a distinction that in looking at

this case you have to look at the market vis-a-vis not the competitors.

In other words, you don't define the tying product market by looking to the market in which Trident printheads compete, but that you look to see what is the impact on those who are not in competition with Trident but who essentially want to sell to Trident — to those who have Trident printheads and to those who are now out of that market.

MR. SIGALE: Again, I come back to Jefferson Parish, which is the law on tying arrangements. You don't solely focus [Tr. 27] on the tied product market. You have to look at the tying product market. The whole concept behind tying is whether or not there was some coercion, perhaps something akin to a leverage theory, and there is just no proof here that that is true. They have other choices.

THE COURT: People have other choices. They can go to Markem. They can go to Xarr. They can go to Label. They don't have to buy Trident's printhead in the first place, and when they bought Trident's printhead, they knew what they were getting into.

MR. SIGALE: Correct.

THE COURT: It's not an Eastman situation, and it's not a situation where unbeknownst to the people involved, lo and behold, Trident turned out to be the only game in town for ink. They knew that when they decided to buy the printhead.

MR. SIGALE: That's correct, Your Honor. In fact, Independent has never raised the Kodak case I think for that very reason. That's why I believe the Kodak case is inapplicable. We actually have something much different. The game has always been played the same. There was this contract, and if you were going to take a license under the patented technology, then you were going to use the ink, which at the time of the contracts Trident believed was patented, but now we have learned otherwise.

THE COURT: I must say I had been focusing on the [Tr. 28] notion of the ink more in connection with the Section 2 claim, but I don't see any evidence of monopolization of the ink market, and I don't think —

MR. SIGALE: I don't know what to draw from the fact that Independent didn't respond to our Section 2 arguments other than they must concede the fact that they are not going to be able to prove that we have the market power, and perhaps Mr. O'Connor will speak to that, but we have pointed out the kind of evidence that's necessary in the Ninth Circuit to prove a relevant market so that you can go forward and prove whether or not Trident had sufficient power in that relevant market. They have put forward no evidence on consumer preference. They have put forward no evidence on supply, and they have put forward no evidence on barriers to entry.

Something did prompt me in the discussion before. Barriers to entry as they are defined in the Trident documents are irrelevant. Barriers to entry in an antitrust sense —

THE COURT: State that again.

MR. SIGALE; You were speaking about barriers to entry and the fact that in one of the documents Trident had mentioned that there were significant barriers to entry if anybody wanted be to be second comer.

In terms of "barriers to entry" as it is defined in the antitrust context, barriers to entry as the Seventh Circuit stated in Will versus Comprehensive Accounting is whether the [Tr. 29] rival's cost of creating a similar item is higher than the full cost of the original creator.

The evidence also shows in that same exact document that it cost Trident $20 to $30 million to produce the exact same technology. Whether there is a significant barrier to entry depends on whether or not it would cost the next comer more money. The fact that it will cost the second comer $20

to $30 million adjusted for inflation is not an antitrust barrier to entry.

THE COURT: In other words, if Trident can spend $20 to $30 million and now be making a profit, somebody else can do the same.

MR. SIGALE: That's correct, as the antitrust analysis goes. Now, that's not the way that a marketing person or the president of a company is going to look at it. The question is somebody else going to make that investment?

THE COURT: Do we know — I am not sure it's in the record — whether ink designed for Trident's printheads works with other printheads like those of Markem and Xarr?

MR. SIGALE: I would concede that it is in the record, and it does not. The printhead ink is a system which leads me to question whether or not there are two separate products or not. It was not raised in the original moving papers on summary judgment presented by Independent Ink as to whether or not they are separate products under the case law, so we didn't [Tr. 30] address it here.

THE COURT: Anything else?

MR. SIGALE: Unless you would like me to address the Hyde comments.

THE COURT: If you wish.

MR. SIGALE: Why would you open the door to considering legislation like this because your constituents are asking you for legislation that specifically says this is what the law is. Much like the statute in the case you heard earlier this morning, it would be nice to have some certainty so you don't have to litigate for three years through six amended complaints. This is the statute, point to the statute, and get out on a Rule 12(c) motion for judgment on the pleadings.

I think corporate America would really like that rather than having to go through the expense of litigation, get to the

summary judgment stage, and then have to show this is where we are at.

THE COURT: What you are saying is that even Congress with all of its arrogance can acknowledge that sometimes it hasn't been terribly clear, and it might be better to be clearer.

MR. SIGALE: I think that's exactly what's going on here. In fact, it was recently raised yet again before the House Judiciary Committee whether or not they needed to amend [Tr. 31] the statute, and — I wish I had the comments here — but the gist of it was we had hoped that the Courts would provide some clarity and perhaps the Federal Circuit would do so. Unfortunately, in the past ten-plus years, that hasn't happened, and so maybe we will have to step in or maybe we won't. Ultimately, they never reached a conclusion on whether they would step in or not.

THE COURT: Thank you very much.

MR. O'CONNOR: May I respond?

THE COURT: Yes, you may.

MR. O'CONNOR: First of all, I would like to make a disclaimer that I do not think Henry Hyde is necessarily the greatest lawyer on the planet. However, I think this time he may have gotten it right because he probably had some good help from his staff.

If you look at the second page of his remarks —

THE COURT: I don't think I have them actually, but go ahead.

MR. O'CONNOR: He says, "The basic problem stems from Supreme Court and lower Federal Court decisions that construe patents and copyrights as automatically giving the intellectual property owner market power, and he cites to Jefferson Parish, United States versus Lowes, and Digitine versus Data General Corporation.

I was looking at Jefferson Parish and not the [Tr. 32] concurring remarks by Justice O'Connor but the remarks by the majority, and I think they have stated it about as clearly as they can, and I might add that they cited International Salt, United States Steel, and Lowes, and I don't know if they cited White Motor Company or not, but they all say the same thing.

What they said was that "If the government has granted the seller a patent or similar monopoly over a product" — it doesn't say anything about something in a market — "a product, it is fair to presume that the inability to buy the product elsewhere" — let me just stop with that.

You heard Mr. Sigale saying, well, they could have bought similar products, Markem or Xarr and the other — they could have bought similar — but they couldn't have bought this product, and that's what the patent tying issue is all about. That's what I said earlier, and I was correct. The patent defines a market. It defines a particular product.

If you want that particular product — in this case, the evidence is overwhelming that they did, and in fact, I believe — I am not sure what the paperwork shows exactly, but these other competitors didn't even exist at that time. If you wanted that patent product, you had to buy from them.

If you bought that particular patented product, it goes onto say, "Any effort to enlarge the scope of the patent monoply by using the market power, it" — again, "it" is that patented product — "confers to restrain competition in the [Tr. 33] market for a second product will undermine competition on the markets in that second market. Thus the sale or lease of a patented item on the condition that the buyer will make all his purchases of a separate tied product from the patentee is unlawful."

I don't know how that could be anymore clear. "The sale or lease of a patented item on the condition that the buyer

will make all his purchases of a separate tied product from the patentee is unlawful."

The market in which the patented product competes is totally irrelevant to that analysis and not discussed at all. Since we are both relying on Jefferson Parish, that's the statement In the majority opinion.

THE COURT: Of course, they also say in sum any inquiry into the validity of a tying arrangement must focus on the market or the market in which the two products are sold and —

MR. O'CONNOR: But they say the presumption there is that there is market power in the tying product, vis-a-vis the tying product, and they specifically say it's illegal, and the other cases say the same thing.

THE COURT: And you think that when Justice O'Connor pointed out a common misperception — or misconception has been that a patent suffices to demonstrate market power because a patent holder has no market power in any relevant sense if [Tr. 34] there are close substitutes for the patented product?

MR. O'CONNOR: Right, for the patented product, close substitutes for the patented product. That is the market in which the patented product is competing, and that's where having a patent doesn't confer any market power.

In other words, just because Trident had a patent on its product doesn't mean it had market power vis-a-vis Zarr and these others. That's what she is talking about that, and that's well settled law. We are not arguing with that. That's different from tying products that are used specifically for the patented product.

Just think about it when you asked Mr. Sigale whether or not this ink could be used anyplace else. It can't. Independent makes ink that be used in the Trident system, and if you just stand back —

THE COURT: I assume independent has some other function in life than to have developed an ink for one —

MR. O'CONNOR: It's irrelevant. They are making a particular product that they want to sell. It could be them. It could be 25 other people. They have every legal right to sell that product.

Now because of a contract premised upon a market on a patented product, they can't sell that product. There is a barrier to their ability to sell their product, and that barrier is illegal. There is no way if those contracts are [Tr. 35] honored that Independent can sell to the people who purchased that patented product. That's exactly what that case law is all about.

As far as the Section 2 issue is concerned, it's the same thing. The market again — I thought we made it clear — with which we are concerned is the market for ink in which Independent competes. Independent is blocked from selling its nonpatented product because of Trident's illegal tying agreements that use the market power of their patent to prevent people from selling ink to be used in that patented product.

Any analysis to the contrary overturn — forget Jefferson Parish. International Salt makes that very clear. I can tell you as a patent lawyer that patent lawyers walk in constant fear and advise their clients do not do anything which in any way involves tying the sales of anything nonpatented to sell the patented product. That's the third rail of patent lawyer, and these people have expressly violated it.

THE COURT: Anything further, Mr. Sigale?

MR. SIGALE: Quickly, Your Honor. I don't want to turn this into a tennis match.

With respect to Jefferson Parish, looking at the language talking about that it's fair to presume that a patent creates market power, initially, Justice Stevens cites to United States

versus Lowes, a copyright case. It continues on to cite United States versus Paramount Pictures, another [Tr. 36] copyright case; then International Salt, a misuse case that also dealt with the Sherman Act 2 and sent it to remand; and then International Business Machines, a misuse case.

Essentially what Mr. O'Connor has pointed to is at best a blind reliance on International Salt, and I believe if you look at Fortner I and Fortner II it calls International Salt into question, but moreover, as we point out in our reply brief, in 1965, the Supreme Court visited directly the issue of whether or not a patent provides market power in the context of a Section 2 case. That's Walker Process, Your Honor, and they held that you have to go through the regular analysis.

Now, perhaps what we are looking at is a swing in the pendulum in hostility towards patents. In International Salt, which was decided almost 30 years before Walker Process, there was a bigger hostility. In fact, International Salt has no reasoning whatsoever. It relies solely upon the prior misuse cases, misuse, the defense, not cases that said it was an antitrust violation and springs upon everyone that all of a sudden there may be some kind of Section 1 violation, but it was not based on any kind of analysis of patents and how unique patents were. I think the test is uniqueness.

As the Ninth Circuit has pointed out, Mercedes Benz automobiles are not unique. You have to take look at them in the context of what other kinds of automobiles you could buy for that kind of market. I guess you would have to look at BMW [Tr. 37] and Audi and whatever else people look at that are considering buying a Mercedes Benz.

That's exactly what we are saying here in Trident's case. You have to look at what other people may buy. They may buy something other than the Trident system, but if they buy into the Trident system, ceratinly the OEM's who are very sophisticated know what they are getting themselves into, and that's what this OEM agreement is about.

THE COURT: I think Mr. O'Connor would say he is really not concerned about the OEM's. He is concerned about the ink producers, and that's why his argument is that the relevant product market is not those products that compete with the printhead system, but it is the Trident printhead system. That's the product market.

MR. SIGALE: Doesn't that shift the focus then to competitors rather than competition? The antitrust laws are about competition, not about competitors, so if we are going to look at this competitor or that competitor, we are shifting the field from what the antitrust laws were designed to protect. Competition is something else.

When you look at it in that crucible, you say we have to look at competition, not competitors, then you come back to the test in Jefferson Parish, and you say where is the power in the tying product market, and what's going in the tied market?

THE COURT: Wouldn't Mr. O'Connor respond — and, Mr.

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AFFIDAVIT OF SERVICE

United States Court of Appeals
for the Federal Circuit
No. 04-1196

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INDEPENDENT INK, INC.,
Plaintiff-Appellant,

vs.

ILLINOIS TOOL WORKS, INC., and
TRIDENT, INC.,
Defendants-Appellees.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by LEVIN & O'CONNOR, Attorneys for Appellant.

That on the 2nd day of September 2004, I served 2 copies the within Replacement Joint Appendix in the above captioned matter upon:

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Unless otherwise noted, 12 copies of each have been hand delivered to the court on the same date as above.

September 2, 2004 */S/ JOHN C. KRUESI, JR.*